TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 239.

MARTHA RAPHAEL, ADMINISTRATRIX OF THE ESTATE OF NATHANIEL W. RAPHAEL, DECEASED, APPELLANT,

vs.

SPENCER TRASK, GEORGE FOSTER PEABODY, EDWARD M. BULKLEY, CHARLES J. PEABODY, AND AGNES NICHOLS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED MARCH 5, 1903.

(16,884.)

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1 [L. S.] The President of the United States of America to Spencer Trask, George Foster Peabody, E. M. Bulkley, Charles J. Peabody, and Acosta Nichols, Greeting:

You are hereby commanded that you and each of you, personally appear before the judges of the circuit court of the United States of America, for the southern district of New York, in the second circuit, in equity, on the first Monday of June, A. D. 1901, wherever the said court shall then be, to answer a bill of complaint exhibited against you in the said court by Nathaniel W. Raphael, and do further and receive what the said court shall have considered in that behalf. And this you are not to omit under the penalty on you and each of you of two hundred and fifty dollars.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the borough of Manhattan, in the city of New York, on the 30th day of Ap'l in the year of our Lord one thousand nine hundred and one and of the Independence of the United States of America, the one hundred and twenty-fifth.

JOHN A. SHIELDS, *Clerk.*

CHARLES L. EASTON,
Solicitor for Complainant.

The defendants are required to enter appearance in the above cause, in the clerk's office of this court, on or before the first Monday of June, 1901, or the bill will be taken *pro confesso* against them.

J. A. S., *Clerk.*

(Endorsed:) U. S. circuit court, Filed Jun- 10, 1901. John A. Shields, clerk.

2 In the Circuit Court of the United States for the Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant,
against
SPENCER TRASK, GEORGE FOSTER PEABODY, E. M. Bulkley, Charles J. Peabody, and Acosta Nichols, Defendants. } In Equity

To the honorable judges of said court in chancery sitting:

Your orator respectfully shows unto your honors that he is a citizen of the State of New Jersey and that the defendants Spencer Trask, George Foster Peabody, E. M. Bulkley, Charles J. Peabody and Acosta Nichols are citizens of the State of New York, and of the said southern district of New York. That the amount in controversy in this action exceeds the sum of two thousand dollars, exclusive of interest.

That your orator brings this suit on his own behalf and on behalf of the holders of other bonds as hereinafter described, who may choose to become co-complainants, upon offering to contribute a *pro rata* portion of the costs and expenses of this action.

Your orator respectfully shows that on January 7th, 1901, he filed a bill of complaint in the United States circuit court for the district of Utah against the Wasatch & Jordan Valley Railroad Company, the Rio Grande Western Railway Company, and Union Trust
3 Company of New York, as trustee to foreclose a mortgage given by the said Wasatch & Jordan Valley Railroad Company, a railroad line consisting of about forty-four miles, located in Salt Lake county, Utah, and to redeem from two underlying mortgages on about thirty-three miles of said road that is in the possession of the Rio Grande Western Railway Company and as alleged by said complainant the said The Rio Grande Western Railway Company is in possession of the whole of said forty-four miles of road as mortgagee under said prior mortgages. In addition to the prayer of the bill of foreclosure and redemption from said underlying mortgages, the bill prays for an accounting on the part of the Rio Grande Western Railway Company for the use and occupancy of the mortgaged premises and that a receiver be appointed to take possession and operate said railroad during the pendency of said suit, and that the Rio Grande Western be enjoined from encumbering or otherwise disposing of the mortgaged premises during the pendency of the suit. A copy of said bill of complaint is herewith attached marked Exhibit A and made a part hereof.

On the 28th of March, 1901, your orator made application before his honor, Amos M. Thayer, one of the circuit judges for the eighth circuit of the United States, at chambers in the city of St. Louis, Missouri, within the said eighth judicial circuit, for the appointment of a receiver *pendente lite*, pursuant to the prayer contained in the said bill of complaint; preliminary to the hearing of the motion for the appointment of a receiver, the Central Trust Company of New York, and the Morton Trust Company of New York, as trustees
4 under certain deeds of trust executed by the Rio Grande Western Railway Company, to secure certain of its mortgage bonds and because by reason of said trust deed, the said last named companies claimed to have some interest in the *res* they were allowed to become parties defendant, and they have until the first Monday of May next, to plead answer or demur to said complainant's bill.

The said defendants, The Wasatch & Jordan Valley Railroad Company, and The Union Trust Company of New York, trustee, are in default, for not having appeared or pleaded, answered or demurred, to complainant's said bill of complaint on or before the first rule day of April, 1901, after having been served in pursuance of the orders of said court to plead, answer and demur on or before said last named rule day.

The defendant The Rio Grande Western Railway Company on the 25th of April, 1901, filed its answer to complainant's said bill of

complaint, a copy of which answer is herewith attached, marked Exhibit B, and made a part hereof.

Your orator shows that at said hearing for the appointment of a receiver, complainant offered, aside from his verified bill of complaint, certain affidavits and documents and depositions, and the Rio Grande Western Railway Company in opposition to said motion for a receiver, offered in evidence certain affidavits, and documents, copies of which moving papers and opposing papers are herewith attached, marked Exhibits C, D and E, and which are made a part hereof.

Your orator further shows that on the 6th day of April,
5 1901, the said Spencer Trask, George Foster Peabody, E. M. Bulkley, Charles J. Peabody and Acosta Nichols, composing the firm of Spencer Trask & Company, carrying on business in the city of New York as bankers, caused to be published the following advertisement in the New York Herald, a daily newspaper published in the city of New York, viz:

6 Financial.

Office of Spencer Track & Co., 27–29 Pine Street, New York.

Notice to Stockholders.

RIO GRANDE WESTERN RAILWAY COMPANY,
27 PINE STREET, NEW YORK CITY, 2*d April*, 1901.

To the stockholders of the Rio Grande Western Railway Company:

We have, in behalf of the holders of more than 90 per cent. of the common stock of the Rio Grande Western Railway Company (being a majority of its entire stock) and the owners of certain allied properties and securities, negotiated for them as vendors with representatives of the Denver & Rio Grande Railroad Company the sale of such majority of common stock, together with such allied securities and properties. The sale by the vendors is subject to ratification by the stockholders of the Denver Company; and a copy of the circular issued to them is herewith enclosed for your fuller information.

We have secured the right to include in the contract all the outstanding common stock, and this circular is issued to advise you that we will accordingly, include in our sale and delivery for the vendors the shares of all other holders who shall, pursuant to the provisions of this circular, deposit their certificates with us prior to the 30th day of April, 1901. Such certificates must be properly endorsed and accompanied by powers of attorney empowering us to give any vote or assent necessary to close the transaction. The
7 deposit will give us the right, if necessary, to transfer the stock into our own names for the purpose of such vote or assent. In lieu of deposit we will accept an obligation to deliver stock given by any member of the New York stock exchange, or by bankers satisfactory to us, but in every such case these certificates must first be transferred into the name of our firm, whereupon

we will endorse it for negotiability and return it to the party giving the obligation.

The price allotted to the common stock by the vendors for whom we have acted is $80. per share, with interest at 4 % per annum from January 1, 1901, to the date of the payment, this amount being reached after deduction of our commission of five dollars per share for our part in the transaction. Since the commencement of the negotiation one Raphael has instituted in the United States circuit — for Utah a suit against the title of the Western Company to the Bingham and Alta spurs of its railroad; and in making the contract for the vendors our firm gave its personal guarantee against any liability of the company in that suit. Although the company's solicitors are confident of success it is proper that our guarantee be ratably shared by all who avail themselves of the contract made by us for the vendors. From the $80. per share and interest mentioned above we shall, therefore, deduct such amount per share as counsel shall advise us will amply protect us upon such guarantee. Such amount will be held in a special trust.

By the terms of the sale the purchasing bankers undertake upon the conclusion of the transaction to procure four preferred stockholders in the Rio Grande Western Railway Company the option
for a reasonable period to exchange their shares for shares of
8 the preferred stock of the Denver & Rio Grande Railroad Company, at the rate of ten shares of the Western stock for eleven shares of the Denver stock. We expect to make such exchange of our own holdings of the preferred stock, and shall recommend to our clients to avail themselves of the option when tendered. The preferred dividend paid by the Denver Company for the six months ending December 31 last was 2½ per cent. Our knowledge of the property of the two companies makes us confident that their reunion under one management should be of great advantage to both.

Within a few days we shall issue forms for transmittal of certificates of the common stock, with proper powers of attorney on deposit or bankers' obligations therefor.

SPENCER TRASK & COMPANY.

Your orator further shows that accompanying said advertisement in the New York Herald of April 6, 1901, there was an advertisement by the Denver & Rio Grande Railroad Company which advertisement is as follows, viz:

9 Financial.

Notice of Special Meeting of Stockholders of the Denver & Rio Grande Railroad Company.

DENVER, COL., *April* 1, 1901.

To the holders of both preferred & common stock of the Denver & Rio Grande R. R. Co.:

Notice is hereby given that a special meeting of the stockholders, both common and preferred, of the Denver & Rio Grande Railroad

Company will be held at the principal office of the company, in the Equitable building at Denver, Colorado, upon Wednesday, the 15th day of May, 1901, at 2 o'clock p. m., for the following purposes:—

1. For the purpose of submitting to a vote of the stockholders of the company the question of purchasing the line of railroad of the Rio Grande Western Railway Company by acquiring the common and preferred stock of that company.

2. For the purpose of submitting to a vote of each class of the stockholders of the company the question of reducing the capital stock of the company, as at present authorized, by cancelling the unissued stock now held in the trea-ury for the purpose of acquiring the property and franchises of the Denver & Rio Grande Western Railway Company—namely, preferred stock to the amount of four million three hundred and fifty thousand dollars ($4,350,000) at par, and common stock to the amount of seven million five hundred thousand dollars ($7,500,000) at par—and thereupon and thereafter increasing the capital stock by increasing the preferred stock from twenty three million six hundred and fifty thousand dollars
10 ($23,650,000.) to forty four million four hundred thousand dollars ($44,400,000.), and of amending and changing the sixth article of the articles of incorporation of the company so as to read as follows:—

Sixth. The capital stock of this company shall be eighty-two million four hundred thousand dollars ($82,400,000) divided into eight hundred and twenty-four thousand (824,000) shares of the par value of one hundred dollars ($100) each. Said stock shall be divided into preferred and common stock as follows, to wit:—Thirty-eight million dollars ($38,000,000), common, forty four million four hundred thousand dollars ($44,400,000) preferred; said preferred stock to be entitled to a non-cumulative dividend of not more than five per cent. per annum, payable out of the net earnings of the company before any dividend shall be declared and paid upon the common stock.

3. For the purpose of submitting to a vote of the preferred stockholders of the company the question of assenting to the issue, for future capital requirements, of the consolidated mortgage bonds of the company amounting to $6,900,000. reserved by the mortgage for the purpose of acquiring the property and franchises of the Denver & Rio Grande Western Railway Company, or for extending the line of railroad of the company to Ogden, as such bonds are not required for said purposes.

4. For the purpose of submitting to a vote of each class of the stockholders of the company a proposed amendment of article ninth of the articles of incorporation of the company, so that the same shall read as follows:—

11 Ninth. The stockholders of this company, or the directors whenever and for such length of time as the stockholders shall so elect, shall have power to make from time to time such prudential by-laws for the government of the company as may be necessary. By a two-thirds vote of their entire number, the directors

shall have power at any time to re-vote any such by-laws or to amend the same in any respect. The meeting of the board of directors of the company may be held in the city of New York or elsewhere beyond the limits of the State of Colorado as shall be provided by the by-laws.

The transfer books for the transfer of stock of the company will close with the close of business on Monday, April 15th, 1901, and re-open on the morning of Thursday, May 16th, 1901.

By order of the board of directors.

THE DENVER & RIO GRANDE
RAILROAD COMPANY,
By EDGAR H. BOOTH, *Secretary.*

Subject to authorization of the increase above proposed $12,500,000. of the new preferred stock will, at the request and on behalf of the parties entitled thereto under the arrangement for acquiring the said property be offered by this company to its stockholders, At the price of 90 % holders of the stock of the company, of record at the closing of the transfer books on April 15th, 1901, may purchase said increased preferred stock at that price, and at the rate of one share of the new preferred stock for every five shares of stock (common or preferred) held by them. The right to purchase will terminate at three o'clock on May 1st, 1901, and must be exercised by actual delivery at the office of the company, No. 47 William St., New York city, on or before that date, of an application for shares and agreement to purchase, executed upon a form which will be mailed to stockholders, and which may be obtained at said office of the company. Payment on account of such purchase must be made at the office of the company:—$20. per share at the time when the agreement to purchase is there lodged, and the balance on May 20th, 1901. On that date the new preferred stock, or interim certificates representing the same, will be there deliverable to such purchasers; or, in the event that such increase of said preferred stock shall not have been authorized, the previous payment of $20. per share will be refunded to the holders of receipts representing such payment upon surrender of the receipts. No subscription for a fraction of a share will be received; but as rights to purchase may be assigned in accordance with a blank form which will be mailed to shareholders and which may, upon application, be obtained at said office of the company in New York, any holder of the certificate of stock for a number of shares which cannot be divided by five without leaving a remainder may, before making a subscription, buy or sell on the open market enough right to make his holdings so divisible. The company will not itself buy or sell rights. Failure to pay the balance of the purchase price when and as payable will terminate all rights in respect to the shares applied for and the instalment previously paid.

12

THE DENVER & RIO GRANDE
RAILROAD COMPANY,
By EDWARD BOOTH, *Secretary.*

13 Your orator shows that on the 27th day of April, 1901, leave of court was granted by Judge Thayer, allowing complainant to amend his said bill of complaint in some slight particulars and which said amendment is herewith attached and set out in Exhibit D, and made a part hereof.

Your orator further shows that on the said 27th day of April, 1901, his honor, Judge Thayer denied complainant's application for a receiver, *pendente lite*, without passing upon the merits of complainant's bill, on the ground, as he stated, in rendering his decision, that he did not believe the complainant would be injured by the non appointment of a receiver, pending the suit.

Your orator further shows that said suit is pending and undetermined, and that if the scheme of Spencer Trask & Co., is allowed to be carried out, that it will hinder and delay your orator in the prosecution of his said suit in Utah.

Your orator shows that the said defendant George Foster Peabody in his affidavit, defendants' opposing papers (Exhibit E, folio 1188 to folios 1191) says that the provision for a fund to be created out of the sale of the shares of the capital stock of the Rio Grande Western to the Denver & Rio Grande Western is to be left in the control of Spencer Trask & Company to be held in trust as a greater assurance that if complainant's claim should be established, it will be paid.

Your orator shows that the members of said firm of Spencer Trask & Company are not parties to the suit pending in Utah and that there is no agreement existing between complainant and the
14 other holders of the outstanding bonds similar to complainant's bonds and Spencer Trask & Co. by which the said proposed "fund" shall be applied toward the satisfaction of complainant's bonds and the other outstanding bonds; that said Rio Grande Western Railway Company claims to own the said railroad covered by the said underlying mortgages by reason of certain alleged foreclosure sales had under powers of sale and advertisement, without ever having obtained any decree in any court authorizing said sales on an alleged default of interest; and your orator shows that a part of the capital stock which the scheme of Spencer Trask & Co. propose to sell, ninety per cent. of the shares of which said Spencer Trask & Company claim to have options upon from the vendors, and said advertisement is calling for a deposit with them of the other ten per cent. of the outstanding shares, provided the same are deposited with the firm of Spencer Trask & Company on or before the 30th of April, 1901, were issued on the said 44 miles of road.

Your orator shows unto your honors as he is informed and believes, that if said consolidation as set forth in the scheme contemplated by the advertisements referred to, is allowed to be carried out without some stipulation between your orator and the members of the said firm of Spencer Trask & Co. as to the custody of the said fund, proposed to be created as aforesaid the rights of remote pur-

chasers of the mortgaged premises, upon which complainant claims a lien, will have intervened pending complainant's suit in Utah, so that if complainant succeeds at the final hearing of his suit in Utah, it will require the bringing in to the suit as defendants, such
15 remote purchasers, as the Denver & Rio Grande Western Railway Company and their proposed successors.

Your orator shows further that the mortgaged property is inadequate security for the 884 bonds, 579 of which are held by your orator, and that the Rio Grande Western, as mortgagee in possession, has after having received its mortgage debt, out of the income of the mortgaged premises, *has* as your orator is informed and believes, a surplus of over $800,000 that is applicable to complainant's bonds, and that the Denver & Rio Grande Western has bonded said forty-four miles of road or that portion covered by the underlying mortgages at over $43,000 per mile, and has issued shares of its capital stock at over $37,000 per mile of road.

Your orator further shows that the rights of the Rio Grande Western are represented by the shares of its capital stock and that the members of the firm of Spencer Trask & Company, as your orator is informed, and believes when they obtained the option upon the said shares from the said vendors had knowledge of the commencement of complainant's suit in Utah and that as your orator is informed and believes that the securement of said option from said vendors by the said firm of Spencer Trask & Company was in disregard of complainant's right, and to prevent the mortgaged premises from remaining *in statu quo* until the final hearing of his suit in Utah.

Your orator therefore prays that a preliminary injunction be issued restraining the said members of the firm of Spencer
16 Trask & Company from selling the said shares of the capital stock of the Rio Grande Western Railway Company to the Denver & Rio Grande Western Railway Company as set forth in the said advertisement of Spencer Trask & Company and which injunction your orator prays may be made perpetual upon the final hearing of this suit, unless the firm of Spencer Trask & Company shall agree to turn over to some trust company in the city of New York at and before the completing of said sale of said shares, a sum of money which may be determined by this court out of the proceeds of said sale, as will be sufficient to satisfy complainant's claim and the other outstanding bondholders similar to his own upon the final hearing of complainant's suit in Utah.

Your orator therefore prays that the said Spencer Trask, Charles Foster Peabody, E. M. Bulkley, Charles J. Peabody and Acosta Nichols be made parties defendant hereto, and that a writ of subpœna be issued, against them in pursuance to the rules and practice of this court, and that they make answer, each for himself or jointly, but not under oath, their respective oaths being hereby waived, and that such other or different decree be granted to your complainant,

as to your honors may seem just, and this the nature of your orator's case require.

CHARLES L. EASTON,
Solicitor for Complainant,
Room 46, 229 Broadway, New York City.

CHARLES L. EASTON, *Of Counsel.*

17 UNITED STATES OF AMERICA,
Southern District of New York,
City and County of New York, } ss.:

Nathaniel W. Raphael, being first duly sworn, deposes and says that he is the complainant in the above entitled suit, and that he has read the foregoing bill of complaint and knows the contents thereof, and that the facts therein stated are true, except as to such matters as are therein stated on information and belief, but as to those matters, he states he believes them to be true.

Deponent further says that he believes that if the said members of the firm of Spencer Trask & Company are not restrained by an order of this court from delivering the said shares of the Rio Grande Western Railway Company to the Denver & Rio Grande Western Railway Company before a notice shall be given of the said application for a preliminary injunction restraining the deliverance of said shares by Spencer Trask & Company to the Denver & Rio Grande Western Railway Company, deponent will be greatly injured, as he believes from the fact that the 30th day of April, 1901 is the last day for the selling of said shares, that said shares will be delivered and sold, and the scheme consummated, to the irreparable injury of deponent before a hearing can be had for said preliminary injunction.

Therefore deponent prays that a restraining order be made directing the said members of the firm of Spencer Trask & Company to withhold the sale and delivery of the said shares and to show cause, returnable at an early date, according to the rules and practice of this court, why complainant should not have a preliminary
18 injunction, as prayed for in the foregoing bill of complaint.

And further deponent saith not.

NATHANIEL W. RAPHAEL.

Subscribed and sworn to before me this 30th day of April, 1901.

LOUIS HEFT,
[SEAL.] *Notary Public, No. 211, N. Y. Co.*

(Endorsed:) United States circuit court, southern dist. of N. Y.—Nathaniel W. Raphael, complainant, ag'st Spencer Trask, and others, defendants.—Bill for injunction.—Charles L. Easton, solicitor for complainant, 229 Broadway, New York city.—U. S. circuit court, Filed Apr. 30, 1901, John A. Shields, clerk.

19 In the Circuit Court of the United States in and for the Southern District of New York.

At a term of said court in chancery sitting this 30th day of April, A. D. 1901.

Present, Hon. Addison Brown, judge.

NATHANIEL W. RAPHAEL, Complainant,
ag'st
SPENCER TRASK, GEORGE FOSTER PEABODY, E. M. Bulkley, Charles J. Peabody, and Acosta Nichols, Defendants. } In Equity.

Upon reading the verified bill of complaint in the above entitled suit, and it appearing from the affidavit of the complainant that if notice is given to the defendants of the application for a preliminary injunction prayed for in the bill of complaint, that complainant will be injured.

Upon motion of Charles L. Easton, counsel for complainant, it is

Therefore ordered that the said defendants show cause at 3 o'clock after noon, on the 1st day of May, 1901 before me at the Post Office building, New York city and county, why the preliminary injunction asked for should not be granted, and in the meantime and until further order herein, the said defendants as composing the firm of Spencer Trask & Company be and they are hereby

Ordered to withhold selling and delivering to the Denver &
20 Rio Grande Railroad Company as contemplated in the advertisement of Spencer Trask & Company the shares of the capital stock of the Rio Grande Western Railway Company, as mentioned in the said advertisement of Spencer Trask & Company, published in the New York Herald of April 6, 1901, annexed hereto.

ADDISON BROWN.

(Endorsed:) U. S. circuit court, southern district of N. Y. Nathaniel W. Raphael, complainant ag'st Spencer Trask *et al.*—In equity.—Order to show cause and restraining order.—Charles L. Easton, solicitor for complainant, 229 Broadway, New York city.—U. S. circuit court, Filed May 1, 1901, John A. Shields, clerk.

21 In the Circuit Court of the United States for the Southern District of New York.

NATHANIEL W. RAPHAEL
against
SPENCER TRASK, GEORGE FOSTER PEABODY, E. M. BULKLEY, Charles J. Peabody, and Acosta Nichols.

STATE OF NEW YORK,
Southern District of New York, County of New York, } *ss:*

Edwin M. Bulkley, being duly sworn, says: I am a member of the firm of Spencer Trask & Company. The papers in this suit

were served upon me about 4 p. m. yesterday, being Tuesday, 30th April, 1901. As I am informed and believe no papers were served upon any other defendant than myself. I annex hereto all the papers served upon me. The blanks at folios 9, 10, 11, 12, 13, 14, 15, 16 and 17 were blanks when the papers were served upon me. No other papers have been served upon me.

I am not and for more than fifteen years have not been either a citizen or resident of the southern district of New York or the State of New York. I am and for upwards of 15 years have been a citizen and resident of New Jersey. For upwards of five years I have resided at Englewood in the State of New Jersey.

My partner, the defendant Spencer Trask, is neither a citizen nor a resident of the southern district of New York. He is both
22 a citizen and resident of the northern district of New York, residing and for many years past having had his residence at Saratoga in the said northern district. He is now temporarily residing and has for several months resided at Tuxedo in the State of New York.

My partner, George Foster Peabody, is not a resident nor citizen of the southern district of New York. He is a resident and citizen and for many years last past and continuously has been, a citizen and resident of the eastern district of New York, residing in the borough of Brooklyn in the said eastern district.

My partner Charles J. Peabody is not a citizen or resident of the southern district of New York or of the State of New York, but is and for many years last past has been a citizen and resident of the State of New Jersey residing at Englewood in the said State.

My firm of Spencer Trask & Co. have entered into an agreement for the delivery and sale of at least 90,000 shares of the common stock of the Rio Grande Western Railway Company (hereinafter called the Western Company) being of the par value of $9,000,000. At the time this agreement was made the present complainant had begun against the Western Company a suit, being the suit mentioned in the papers served herein, to recover or, rather redeem, from the Western Company two spurs of the railroad of that company known as the Bingham spur and Alta or Wasatch spur. The proposed purchasers of such common stock were, as I am informed and believe, not familiar with that suit; but as my firm was familiar we felt bound to protect the purchasers against any loss to or
23 diminution of the value of the common stock to be so purchased, in case the complainant's claim about the said spurs should turn out to be valid. My firm did, therefore, agree to indemnify the proposed purchasers against loss, if any, by reason of such suit. The Western Company was advised by its counsel and my firm knew of that advice and believed it to be correct, that there was no valid claim on the part of the complainant. But as the proposed purchasers could not know that or, at least, could not learn that within the short time available, my firm gave the stipulation of guaranty. That stipulation was not given to the complainant or in the complainant's interest. It had no concern with the com-

plainant. It was a stipulation only to the effect that if the complainant should succeed, then my firm would indemnify the new owners of the common stock of the Western Company as aforesaid.

My firm was itself the owner of some of the common stock proposed to be sold and in stipulating to sell as many as 90,000 shares, it had the assent of other holders of such common stock. My firm after making such agreement, invited other owners who cared to join in the sale to endorse their shares to my firm who would hold such shares as agents for such depositors and for the purposes of such sale. It was deemed proper that all owners of such common stock who should avail themselves of the sale so contracted for by my firm, should indemnify my firm against any liability to be incurred by them by reason of such guaranty. My firm, therefore, notified holders of the common stock of the Western Com-
24 pany that if they availed themselves of the sale made by my firm, they must permit my firm to deduct from the purchase price when paid a suitable amount to indemnify my firm against its liability to the purchasers. So far as concerns shares or any shares of the common stock of the Western Company or anything connected with or related to such shares of the Western Company, my firm has no relation whatever with the complainant. It has made no stipulation, contract or agreement and has had and has no understanding whatever with him. It has not acted for him in any way nor has it proposed to act for him in any way nor has it made any stipulation or contract for his benefit.

The liability of my firm under its contract is for a very large amount and is of a very serious character. The order issued herein orders my firm to withhold selling and delivering to the Denver & Rio Grande Railroad Company shares of the capital stock of the Western Company. My firm is under contract to sell and deliver either to the Denver & Rio Grande Railroad Company or to any other person or company designated by the persons with whom my firm entered into the contract aforesaid, stock as aforesaid. A breach of such agreement on the part of my firm would expose my firm to the possibility of enormous damage.

The defendants have no notice whatever that any security has been given by the complainant for the issue of the order herein and I respectfully submit that my firm ought not, under the circumstances, to be under any restraint at the suit of the complainant.

The statement of the complainant in his bill "if the scheme
25 "of Spencer Trask & Co. is allowed to be carried out, that it "will hinder and delay your orator in the prosecution of his "said suit in Utah" is absolutely without foundation. What the orator calls the "scheme of Spencer Trask & Company" is a plan to sell common stock belonging to them and to such other owners of such common stock as shall endorse their shares to them for sale. It has and can have no effect whatever on the prosecution of the orator against the Western Company and the other parties made defendants in the suit brought against that company. If he have any claim against that company his claim remains in full force no

matter what transfers shall be made of the common stock by Spencer Trask & Company or any other owners of such common stock.

With respect to the suit brought by the complainant in the United States circuit court for the district of Utah and with respect to the claim of the complainant against the Western Company, I respectfully refer to the papers submitted in behalf of the Western Company to the Honorable Amos N. Thayer, circuit judge, upon the argument of complainant's motion for a receiver.

The said Western Company is a company of very large responsibility and abundantly able to respond many times over to the utmost claim which the orator claims to have. There is no proposal whatever to interfere with the status of the premises upon which the complainant claims to have a mortgage and mentioned in his bill as "the mortgaged premises." There has been no intention
26 whatever on the part of my firm or any member of it "to pre-
"vent the mortgaged premises from remaining *in statu quo* "until the final hearing of his (complainant's) suit in Utah."

I further state upon my information and belief that the said mortgaged premises are security many times over for any and every claim which the orator has.

The orator, as I am informed and believe, acquired the pretended bonds upon which his claim is made for little if anything and as a mere speculation. The present suit is, as I am informed and believe, instituted in order to harass my firm by reason of the contract into which they have entered as aforesaid and to make what is commonly known as a "strike" upon my firm to compel it to pay money to the complainant in order to secure a release from the embarrassment of any litigation brought against it at this time and especially from the embarrassment of any suit in which a restraining or injunction order may be entered.

The complainant, as I am informed and believe, prepared and procured to be published in the New York papers of to-day, a full account of his claim, laying especial stress upon the fact that this court had issued a restraining order. This was done in order, as I am informed and believe, to put the defendants under an acute pressure to submit to a sheer and gross attempt at extortion. The complainant and his counsel, attorney and solicitors, I am informed and believe, perfectly well know that if the complainant have any claim against the Western Company that claim will be properly tried and if it be adjudged that the claim is in any respect
27 valid, then that the claim will be fully met and discharged to such extent by the Western Company.

The current directory of the city of New York, boroughs of Manhattan and the Bronx, being the directory for the year 1900, states my residence as follows: "Bulkley, Edwin M., banker, 27 Pine, h Englewood, N. J."

The same directory states the residence of my partner, Charles J. Peabody, as follows: "Peabody, Chas. J., banker, 27 Pine, h Englewood, N. J."

The same directory states the residence of my partner, Spencer Trask, as follows: "Trask, Spencer, banker, 27 Pine, h Saratoga Springs, N. Y."

The same directory states the residence of my partner George Foster Peabody as follows: "Peabody, Geo. Foster, banker, 27 Pine, h 28 Monroe pl. Bklyn."

EDWIN M. BULKLEY.

Sworn to before me this first day of May, 1901.

WM. MASON SMITH,
Notary Public, N. Y. Co.

[SEAL.]

28 In the Circuit Court of the United States for the Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant,
against
SPENCER TRASK, GEORGE FOSTER PEABODY, E. M. Bulkley, Charles J. Peabody, and Acosta Nichols, Defendants. } In Equity.

SOUTHERN DISTRICT OF NEW YORK,
State of New York, County of New York, } *ss:*

George Foster Peabody, being duly sworn, says: I am named herein as a defendant, and am a member of the firm of Spencer Trask & Co. I have read the annexed affidavit of Edwin M. Bulkley. The same is in all respects true. I have for upwards of thirty-five years last past been continuously and now am a citizen and resident of the borough of Brooklyn in the eastern district of New York. I am neither a citizen nor a resident of the southern district of New York or of any portion of the city of New York, except that, since the consolidation of Brooklyn with New York I have been a resident and citizen of the borough of Brooklyn, which until such consolidation was the city of Brooklyn. No papers in this action have been served upon me.

GEORGE FOSTER PEABODY.

Sworn to before me, this 1st day of May, 1901.

WM. MASON SMITH,
Notary Public, N. Y. Co.

[SEAL.]

29 In the Circuit Court of the United States for the Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant,
against
SPENCER TRASK, GEORGE FOSTER PEABODY, E. M. Bulkley, Charles J. Peabody, and Acosta Nichols, Defendants. } In Equity.

SOUTHERN DISTRICT OF NEW YORK,
State of New York, County of New York, } *ss.:*

Spencer Trask, being duly sworn, says: I am named herein as a defendant, and am a member of the firm of Spencer Trask & Co. I have read the annexed affidavit of Edwin M. Bulkley. The same is in all respects true. I have for upwards of fifteen years last past been continuously and now am a citizen and resident of Saratoga in the county of Saratoga, in the northern district of New York. I am neither a citizen nor a resident, and have never been a citizen or resident of the southern district of New York, or of the city of New York. No papers in this action have been served upon me.

SPENCER TRASK.

Sworn to before me, this 1st day of May, 1901.

WM. MASON SMITH,
[SEAL.] *Notary Public, N. Y. Co.*

30 In the Circuit Court of the United States for the Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant,
against
SPENCER TRASK, GEORGE FOSTER PEABODY, E. M. Bulkley, Charles J. Peabody, and Acosta Nichols, Defendants. } In Equity.

SOUTHERN DISTRICT OF NEW YORK,
State of New York, County of New York, } *ss.:*

Charles J. Peabody, being duly sworn, says: I am named herein as a defendant, and am a member of the firm of Spencer Trask & Co. I have read the annexed affidavit of Edwin M. Bulkley. The same is in all respects true. I have for upwards of eight years last past been continuously and now am a citizen and resident of the State and district of New Jersey. I am not and never have been a citizen or resident of the southern district of New York. No papers in this action *had* been served upon me.

CHARLES J. PEABODY.

Sworn to before me, this 1st day of May, 1901.
WM. MASON SMITH,
[SEAL.] *Notary Public, N. Y. Co.*

31 In the Circuit Court of the United States for the Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant,
against
SPENCER TRASK, GEORGE FOSTER PEABODY, E. M. Bulkley, Charles J. Peabody, and Acosta Nichols, Defendants. } In Equity.

SOUTHERN DISTRICT OF NEW YORK, }
State of New York, County of New York, } ss:

Acosta Nichols, being duly sworn, says: I am named herein as a defendant, and am a member of the firm of Spencer Trask & Co. I have read the annexed affidavit of Edwin M. Bulkley. The same is in all respects true. I am, and always have been, except for the year- 1895–96, a citizen and resident of the State of New York, and for the last four years have resided in the borough of Manhattan, in the southern district of New York. During the year- 1895–96, I resided in the State of New Jersey. No papers in this action have been served upon me.

ACOSTA NICHOLS.

Sworn to before me, this 1st day of May, 1901.
[SEAL.] THOMAS PLUNKETT,
Notary Public, Kings County, N. Y.

Certificate filed in New York county.

32 (Copies of the restraining order and bill for injunction were annexed to the foregoing affidavits and served on the defendants.) The order will be found at page 19 and the bill at page 2.

(Endorsed:) U. S. circuit court, southern district of New York,—Nathaniel W. Raphael ag'st Spencer Trask and others.—Affidavits of Edwin M. Bulkley and other defendants. Verified May 1st, 1901. Parsons, Shepard & Ogden, solicitors for defendants appearing for the purpose of opposing the motion only. 111 Broadway N. Y.—U. S. circuit court, Filed May 2, 1901, John A. Shields, clerk.

33 EXHIBIT A.

In the U. S. Circuit Court for the Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant,
vs.
SPENCER TRASK ET AL., Defendants. } In Equity.

In the Circuit Court of the United States in and for the District of Utah.

NATHANIEL W. RAPHAEL, Complainant,
vs.
WASATCH & JORDAN VALLEY RAILROAD COMPANY, The Rio Grande Western Railway Company, and Union Trust Company of New York, as Trustee, Defendants. } Bill in Equity.

Bill of Complaint.

Charles L. Easton and Pierce, Critchlow & Barrette, complainant's solicitors.

U. S. circuit court, Filed Apr. 30, 1901.
JOHN A. SHIELDS, *Clerk.*

34 In the Circuit Court of the United States in and for the District of Utah.

NATHANIEL W. RAPHAEL, Complainant,
against
WASATCH & JORDAN VALLEY RAILROAD COMPANY, The Rio Grande Western Railway Company, and Union Trust Company of New York, as Trustee, Defendants. } Bill in Equity.

To the judges of the circuit court of the United States for the district of Utah, in chancery sitting:

Complainant shows unto your honors that he is a citizen of the State of New Jersey; that the defendant, The Wasatch and Jordan Valley Railroad Company, is a corporation organized under the laws of the Territory, now State of Utah, and is a citizen of the State of Utah; that the defendant, The Rio Grande Western Railway Company is a corporation organized under the laws of the Territory, now State of Utah, and also under the laws of the
35 State of Colorado, as hereinafter described, and is a citizen of the State of Utah; that the defendant, The Union Trust Company of New York, as trustee, is a corporation organized under the laws of the State of New York, and is a citizen of the State of New York; that the amount in controversy in this suit exceeds ex-

clusive of costs and interest, the sum or value of two thousand dollars; that complainant brings this bill on his own behalf as an owner of 579, hereinafter described, $1,000 mortgage bonds, executed by the defendant, The Wasatch and Jordan Valley Railroad Company, and on behalf of all other of said bond holders similarly situated, who may choose to join as co-complainants and bear a *pro rata* portion of the expense of this suit; and complainant respectfully shows to your honors:

I. The defendant, The Wasatch & Jordan Valley Railroad Company, for the purpose of securing the payment of 1,200 of its mortgage bonds of the denomination of $1,000 each, dated May 1st, 1879, and payable May 1st, 1904, with interest at the rate of seven per cent. per annum, payable on the first day of November, and the first day of May in each year, upon the surrender of the respective interest coupons annexed to said bonds, conveyed to the defendant, The Union Trust Company of New York, as trustee, by its certain trust deed, also dated May 1st, 1879, copy of which trust deed is herewith attached, marked Exhibit "A" and made a part hereof, the whole of its then completed railroad line, situated in Salt Lake county in the Territory of Utah, commencing at a point in Bingham cañon, and running thence easterly by way of Sandy station on the Utah Southern railroad (now the Oergon Shore Line) to Alta in the Little Cotton Wood cañon, consisting of about 33 miles of main line and 11 1/2 miles of tramway railroad extensions of said
36 railroad westerly from a terminal point of said main line in said Bingham cañon, together with the franchise of said railroad, its rolling stock, stations, fixtures, lands and all income, tolls, rents, money and property thereof, which it then owned or might thereafter acquire; and which trust deed was recorded in the office of the recorder of said Salt Lake county, June 2d, 1879, in Book "H" of Mortgages, at page- 303 to 313 inclusive.

II. Said trust deed further provides that should default be made in the payment of said interest or any part thereof on any day whereon the same was made payable and said interest coupons having been presented, and payment of the interest thereon specified having been demanded, and such default of payment having continued for a period of six months after the said interest coupons shall have been due and payment been demanded, and upon a written demand by the holders of at least four hundred of said outstanding bonds, addressed to defendant, The Union Trust Company of New York as trustees aforesaid, then and there upon the principal of all the said bonds, which may be then outstanding, shall become immediately due and payable, and thereupon the defendant, said Union Trust Company, as trustees aforesaid, shall have the right to sell and dispose of all and singular said railroad, its franchise, and property, at public auction, by advertisement, in the manner as provided by said trust deed, and after deducting from the proceeds of said sale, the expenses of said sale, and all payments which have been made for taxes and assessments, and for liens existing prior to the lien of said trust deed, the remaining proceeds are to be applied to the pay-

ment of the interest which shall have been at the time accrued on all outstanding bonds *pro rata* until all such interest shall be paid, and afterwards to apply the remainder to the payment of the
37 principal of said bonds, *pro rata*, which bonds may be outstanding until such principal shall be paid, and if after payment of such principal and interest in full, there shall still remain a surplus, the same shall be paid to the defendant, The Wasatch & Jordan Valley Railroad Company, its successors or assigns.

III. Said trust deed further provides that said bonds are to be issued only at the rate of $20,000 for each completed mile of road, and that when so issued they may be sold hypothecated or otherwise disposed of by the officers and agents of the defendant, The Wasatch & Jordan Valley Railroad Company upon the most favorable terms to be obtained. Complainant further shows, as he is informed and believes, that immediately after the recording of said trust deed, there was issued and sold and has been outstanding ever since said sale, 884 of said bonds, of which complainant owns 579; and complainant is informed and believes, the holders of said 579 bonds demanded payment from the defendant, The Wasatch & Jordan Valley Railroad Company of the interest coupons attached to said 579 bonds, which fell due November 1st, 1899; and default has been made in the payment of the said last mentioned interest coupons attached to said 579 bonds, and such default has continued and said interest coupons due November 1st, 1899, have remained due and unpaid for a period of more than six months since the demand of payment aforesaid; that a written demand has also been made upon the defendant, the said Union Trust Company of New York, as said trustees aforesaid, by the holders of said 579 outstanding bonds, because of said default, to declare the principal of said 579 outstanding bonds immediately due and payable and to institute a suit to
38 foreclose said trust deed; and complainant shows that said trust company declines to so act as said trustee and also declines to bring suit of foreclosure of said trust deed, and because of the said refusal of the said trust company to act as aforesaid, and because the defendant, the said Wasatch & Jordan Valley Railroad Company, has failed to pay the said interest coupons demanded to be paid as aforesaid, and because more than six months has elapsed since said demand of payment was made, and said default has ever since continued and does now continue, complainant has elected to declare and does hereby declare the whole principal sum of each of said 579 bonds to be now due and payable; and complainant shows that there is now justly due on all of said 579 bonds, the sum of $579,000 of principal; and on certain interest coupons annexed to said 579 bonds, including interest to January 1st, 1901, there is due of interest, $825,976.83, making a total of principal and interest of $1,404,970.83, which amount complainant is entitled to have paid to him by the defendant, The Wasatch & Jordan Valley Railroad Company, or paid to him out of the proceeds of the sale of said railroad properties under a foreclosure proceeding of said trust deed.

IV. Complainant further shows upon information and belief, that the defendant, The Rio Grande Western Railway Company, is in possession of said railroad and claims to have some interest in or lien upon the same; but which possession, interest or lien, complainant avers upon information and belief, has accrued subsequent to complainant's right to a lien upon said railroad under said trust deed of May 1st, 1879; and that said possession, interest or lien has not destroyed complainant's right under said trust deed of May 1st, 1879, to have possession of said railway and its equipment taken from the said defendant, The Rio Grande Western Railway
39 Company, and sold under foreclosure proceedings for the non-payment of said 579 bonds and said interest thereon; and complainant further shows, that he for the first time discovered, in the month of July, 1898, that the defendant, The Rio Grande Western Railway Company acquired said possession, interest or lien through fraudulent proceedings, hereinafter described, and complainant avers upon information and belief, that said fraud and manner of acquiring possession of said railroad, ever since said bonds were issued, was kept concealed from the said Union Trust Company, as trustee, and from the holders of said outstanding bonds, and was unknown to this complainant, to either said trust company or said bond holders until discovered by complainant, in July, 1898. Complainant shows, upon information and belief, that the evidence, in a great part of said fraud, is contained in the books of account and financial statements of said railroad, and which books and statements were taken possession of by the officers and agents of the defendant, The Rio Grande Western Railway Company and the predecessors of said last named railroad about the time said possession of said railroad was acquired and ever since the year 1881, have been kept concealed and are now concealed by said officers and agents of said last named railroad company.

V. Complainant shows that on April 29th, 1879, the defendant, The Wasatch & Jordan Valley Railroad Company was formed under and in pursuance of the laws of the Territory of Utah, by the consolidation of a railroad company, also organized under the laws of the Territory of Utah, called the Bingham Cañon and Camp Floyd Railroad Company with a certain other railroad corporation, also organized under the laws of the Territory of Utah, and also called the Wasatch & Jordan Valley Railroad Company, and by uniting and consolidating the franchise, capital, stock, properties,
40 debts, assets and effects of said last named two railway companies; at the time of said consolidation, the said last named Wasatch & Jordan Valley Railroad Company owned that part of said railroad line, constituting a part of said mortgaged premises conveyed to said Union Trust Company, trustee aforesaid, commencing at Sandy station, on the Utah Southern railroad, and running thence in an easterly direction to Alta in the Little Cotton Wood cañon, situated in Salt Lake county, in the Territory, now State of Utah; and at the time of the said consolidation the said Bingham Cañon and Camp Floyd Railroad Company owned that part of said

railroad line, constituting that part of said mortgaged premises conveyed to said Union Trust Company, trustee aforesaid, beginning at said Sandy station, and running westerly to a point in Bingham cañon, described in said trust deed of May 1st, 1879, as "Bingham precinct;" and at the time of said consolidation there was a trust deed covering that part of said railroad line owned by the said old Wasatch & Jordan Valley Railroad Company, dated April 10, 1873, running to Augustus Kountz and William A. Hall as trustees, to secure the payment of 710 bonds of the said old Wasatch & Jordan Valley Railroad Company, of the denomination of $500 each, bearing date April 10th, 1873, and aggregating $355,000 of bonds, and payable May 1st, 1893, with interest at the rate of nine per cent. per annum, evidenced by interest coupons, payable on the first day of May and November in each year, up to and including the period of the maturity of said bonds on said May 1st, 1893, which trust deed to said Kountz and Hall, as trustees, was recorded June 21st, 1873, in Book "D" of Mortgages, page- 199 to 206 in the office of the recorder of Salt Lake county, in the Territory of Utah, and at the time of said consolidation there was also a trust deed by the said
Bingham Cañon (spelt in said mortgage "canyon") and
41 Camp Floyd Railroad Company to George T. M. Davis and
Charles W. Scofield, as trustees, dated June 3d, 1874, conveying to said last named persons as trustees that part of said consolidated railroad line commencing at said Sandy station, and running thence westerly to a point in said Bingham cañon, as aforesaid, for the purpose of securing the payment of 300 bonds of said Bingham Cañon and Camp Floyd Railroad Company of the denomination of $1,000 each, dated June 3d, 1874, and payable July 1st, 1894, with interest thereon at eight per cent. per annum, evidenced by interest coupons annexed to said bonds, payable July 1st, and January 1st, in each and every year, from the date of said bonds until the maturity of the same, on said July 1st, 1894; said trust deed to said Davis and Scofield, trustees, was recorded July 2d, 1874, in Book "E" of Mortgages, at pages 328 to 344, in the office of the recorder of said Salt Lake county, in said Territory of Utah. It was provided in said last mentioned trust deed, that said $300,000 of bonds should not cover, as a security for their payment, any extension or extensions of said Bingham Cañon (canyon) and Camp Floyd railroad from the then existing western terminal of said last mentioned railroad "at a point in Bingham cañon." Complainant is informed and believes that said last named railroad, after the recording of its said last mentioned mortgage, extended its said railroad line, and before said consolidation, in a westerly direction to the mining district in the mountains; the said western terminal point in said Bingham cañon, at that time, was located by the building of the depot at a point in said Bingham cañon, called Bingham City, and is the present western terminal of the main line of said steam road; said extensions from said western terminal consists of about 11½ miles of tramways; and complainant avers that said extensions became a part of said con-

42 solidated railroad line and then became the property of the defendant, The Wasatch & Jordan Valley Railroad Company, free from any incumbrance, except the lien created by said trust deed of May 1st, 1879, to the said Union Trust Company, trustee, as aforesaid. Complainant further shows, as he is informed and believes, that one George M. Young, claiming to act as trustee in place of the said Augustus Kountz and William A. Hall, trustees, in the said trust deed of April 10th, 1873, purported to sell under certain powers of sale, expressed in said trust deed, on the 29th day of December, 1881, at the Exchange salesrooms, at number 111 Broadway, in the city of New York, the railroad and equipment described in said last named trust deed to the Denver and Rio Grande Western Railway Company, a railroad corporation then existing under the laws of the Territory of Utah, for the alleged sum of $50,000 cash; that thereupon the said Young, in pursuance of said sale, executed a certain deed of conveyance, bearing date December 31st, 1881, but not acknowledged until June 15th, 1882, and recorded in the recorder's office of said Salt Lake county, in the Territory of Utah, July 27th, 1882, in Book "T" of Deeds and Transfers at pages 680 to 688, by which conveyance the said Young purported to convey said railroad line and its equipments, which railroad runs from said Sandy station to Alta, a distance of about 17 miles, to the said The Denver & Rio Grande Western Railway Company. Complainant further shows that said Charles W. Scofield and George T. M. Davis, as complainant is informed and believes, acting as said trustees under the said trust deed, made by the said Bingham Cañon and Camp Floyd Railroad Company, bearing date June 3d, 1874, also purported to sell to the said The Denver and Rio Grande Western Railway Company, under the power of sale expressed in said
43 last named trust deed at the said Exchange sales rooms, in New York city, on July 5th, 1881, the railroad line and equipment described in said mortgage of June 3d, 1874, for the alleged consideration of $300,000; that thereupon the said Scofield and Davis, in pursuance of said sale, executed a certain deed of conveyance, bearing date September 1st, 1881, but not acknowledged till October 7th, 1881, and recorded in the office of the recorder of Salt Lake county, in the then Territory of Utah, April 12th, 1882, in Book "S" of Deeds and Transfers, at pages 944 to 950, by which deed the said Scofield and Davis purported to convey as trustees aforesaid, said railroad property, consisting of about 16 miles of railroad line, commencing at said Sandy station and running in a westerly direction to a point in Bingham cañon, to the said The Denver and Rio Grande Western Railway Company; there was also included in said conveyance about 4 miles of spurs to the smelters in and about Sandy station; there was also included in said conveyance the equipment of said road.

VI. Complainant further shows upon information and belief that at or about the times of the recording of the said trustee's deeds to the said The Denver & Rio Grande Western Railway Company, said last named railroad took possession of said railroads, amount-

ing to 33 miles of main line and said 4 miles of spurs together with said equipment, and also took possession of said 11½ miles of tramway extension, from the western terminal, although no portion of said 11½ miles of extensions was embraced in said foreclosure sales, and from the time said last named railroad took possession it continued to use the same and receive the tolls and income thereof until a certain time before the first of July, 1889, when in accordance with and in pursuance of the laws of the State of Colorado, and the Territory of Utah, the said de-
44 fendant, The Rio Grande Western Railway Company, was organized and incorporated by the consolidation of the State Line and Denver Railway Company, a railroad corporation of the State of Colorado, and the said The Denver and Rio Grande Western Railway Company, a corporation of the Territory of Utah, as aforesaid, by uniting and consolidating the franchises, capital stock, properties, debts, assets and effects of the said two last named railway companies, whereupon the said defendant The Rio Grande Western Railway Company assumed possession, and has ever since been receiving the tolls and income of the same said railroads and equipment, including said 11 1/2 miles of extensions; complainant further shows, upon information and belief, that at the times when said Young and said Scofield and Davis pretending to act as trustees as aforesaid, made the said foreclosure sales as aforesaid, there was no actual default of certain interest coupons, upon which default the principal of the bonds *were* declared to be due, as set forth by said trustees in the said conveyances to the said The Denver and Rio Grande Western Railway Company of said railroads, but that the net earnings of the said respective railroads upon which said underlying mortgages were then existing, complainant shows, as he is informed and believes, were more than sufficient to have paid the said coupons, not only at the time when said default was declared but on the days when the foreclosure sales took place, upon which alleged default said foreclosures were made; and complainant charges upon information and belief that the attorneys, officers and agents of the said The Denver and Rio Grande Western Railway Company, at and before the said purchase, knew that there was sufficient net earnings of said railroads to pay said coupons, and yet for the purpose of depriving the holders of the said $579,000
45 of bonds and the other bondholders of their security upon said railroad property under the said trust deed of May 1st, 1879, and also as complainant is informed and believes, in order to enable the said The Denver and Rio Grande Western Railway Company to acquire possession of said railroad properties, its officers, agents and attorneys entered into a fraudulent scheme with the said trustee, Charles W. Scofield, who was then the president of the said consolidated road, and was then controlling the management and affairs of the said consolidated railroad, the defendant, The Wasatch & Jordan Valley Railroad Company, then owning said constituent railroads, and also controlled the disposition of the net earnings of the same; by which fraudulent scheme it was understood and

agreed by and between said agents, attorneys and officers of the said The Denver & Rio Grande Western Railway Company and the said Scofield, that the said default should be declared to exist when no default actually existed, for six months on said installments of said certain interest coupons on said outstanding bonds, secured by the said underlying mortgages, and the principal of said bonds be declared to be due by reason of said alleged default; by which fraudulent scheme it was further understood and agreed, as complainant is informed and believes, that the substitution by said Scofield of said Young, who was a clerk of said Scofield and an employee of said consolidated railroad, should be pretended to be made, when in fact no such substitution, as complainant is informed and believes, was ever legally made, as trustee in place of the said Kountz and Hall, and that it was further understood and agreed that said Young, by reason of said alleged default of certain six months' interest, coupons should declare the principal of the said bonds due, which bonds are described in the said trust deed made to said Kountz and Hall, though by their terms
46 said bonds would not fall due until May 1st, 1893; and thereupon it was further understood and agreed that said Young, as said pretending trustee, should advertise and sell said railroad at the said Exchange sales rooms, in the city of New York, under the powers of sale named in the trust deed, in which said Kountz and Hall were named as trustees; that the said Davis, though a joint trustee with said Scofield, as complainant is informed and believes, left the performance of the said trustees' duties to the said Scofield, who on his own and said Davis' behalf it was understood and agreed was to declare the principal of the said bonds due, because of an alleged six months' default in the payment of certain interest coupons upon the said outstanding bonds secured by the said trust deed in which the said Scofield and Davis were named s trustees; and that thereupon, as complainant is informed and believes, said Scofield and Davis, as aforesaid, were to advertise and sell the railroad properties covered by their said trust deed, by virtue of the powers of sale named in thier said trust deed, at the Exchange sales rooms, in the city of New York. Complainant further shows, upon information and belief, that the said foreclosure sales of the said railroad properties by the said Young and by the said Scofield and Davis, at the times and place and in the manner as aforesaid to the said The Denver & Rio Grande Western Railway Company, was all done in accordance with the aforesaid fraudulent scheme. Complainant further shows, upon information and belief, that it was agreed by all the parties to said fraudulent scheme that in consideration of said Scofield engineering said scheme, the said Scofield was to be allowed a one-third share in the profits of the purchase by the said The Denver & Rio Grande Western Railroad Company of both of the said railroad properties covered by the foreclosure of the
47 said underlying mortgages. Complainant further shows, as he is informed and believes, neither the said Scofield or Davis were present in said Exchange sales rooms, in the city of New York,

at the time of said purported foreclosure sale under the said trust deed, in which they were named as trustees, and that neither of them acting as trustees as aforesaid ever at any time offered for sale in said Exchange sales rooms, the said railroad property described in said trust deed, but that as complainant is informed and believes, the attorneys and agents of the said The Denver & Rio Grande Western Railway Company conducted all the proceedings of said sale and acted as auctioneers and also bid off said railroad property in the name of Charles F. Woerishoffer, who, at that time, was a director of said The Denver & Rio Grande Western Railway Company, and who acted for and on behalf of said last named railroad company in allowing the said attorneys to use his name to make said bid of $300,000 for said railroad, and who directed the said trustee's deed to be made conveying said railroad property as sold to said The Denver & Rio Grande Western Railway Company, on July 5th, 1881; and as complainant is informed and believes said attorneys prepared the said deed of said sale by the said Scofield and Davis to the Denver & Rio Grande Western Railway Company; and the said Scofield and Davis, as complainant is informed and believes, signed and executed said deed of sale so prepared by the said attorneys, of the Denver & Rio Grange Western Railway Company, without ever having received any portion, at any time, of the said $300,000 bid for said railroad properties. Complainant further shows that in the said underlying mortgage in which the said Charles W. Scofield and George T. M. Davis were named as trustees, dated June 3d, 1874, there is no authority given to the said trustees to delegate their authority to any person or
48 persons to offer said property for sale in the foreclosure of said mortgage, and as complainant is informed and believes, no express authority was ever given by said Scofield and Davis to any one to make said sales in their stead on July 5th, 1881; but, as complainant is informed and believes, the selling and bidding by the said attorneys, the drawing of said deed of conveyance and the execution of the same by said Scofield and Davis to the Denver & Rio Grande Western Railway Company was in accordance with the said fraudulent scheme in order to give possession to the Denver & Rio Grande Western Railway Company of said railroad property, without allowing the property to be sold at the highest market price at public auction. Complainant further shows, upon information and belief, that at the time of said fraudulent sale the said Bingham Cañon and Camp Floyd railroad was worth at least $1,000,000, and was paying a net sum of over six per cent. per annum of interest, upon said amount and that, as complainant is informed and believes, the said sum of $300,000 alleged to have been paid was an inadequate price for said railroad property, at the time of said pretended sale. Complainant further shows, upon information and belief, that the said old Wasatch & Jordan Valley railroad at the time of said fraudulent foreclosure sale by the said Young was worth at least the sum of $800,000 and was paying a net sum equal to over

six per cent. per annum of interest on said amount; and complainant charges upon information and belief, that the said sum of $50,000 cash, that was pretended to have been bid for said last named railroad at said fraudulent foreclosure sale was not paid, and that said sum was an inadequate price for said railroad. Complainant is informed and believes and so charges the fact to be, that the said $355,000 of bonds, which were outstanding and secured by the
49 said trust deed, under which said trust deed the sa-d Young pretended to act as said trustee in making said fraudulent foreclosure sale, were owned by various persons and corporations and that on the 27th of December, 1881, the day fixed by said Young in his advertisement to sell said railroad, the said Young and the said officers and attorneys of the Denver & Rio Grande Western Railway Company learned that certain of said bondholders, who were men of large means, would bid at said sale, for said railroad at least the sum of $355,000 about the amount of the said bonded indebtedness, thereupon, and at the request of the officers of the said The Denver & Rio Grande Western Railway Company, in order to prevent said threatened competition of bidders as said sale and prevent a higher bid than the said $50,000 cash, the alleged amount for which said road was sold the said Young, adjourned the said sale, without readvertising, until December 29th, 1881, at the same hour of the day and at the same place as named in the published advertisement notice of sale; that thereupon as complainant is informed and believes, the officers and attorneys of the said, The Denver & Rio Grande Western Railway Company, at once agreed with the said certain bondholders, that if they the said certain bondholders would not make competitive bids against the said bid of $50,000 of the said The Denver & Rio Grande Western Railway Company, at said adjourned foreclosure sale to be held on the said 29th day of December, 1881, it, the said The Denver & Rio Grande Western Railway Company, would give the said certain bondholders, who intended to bid for said railroad at said sale as aforesaid, bonds of an equal amount as those held by said named bondholders, secured by said trust deed to Scofield and Davis to be issued by the said, The Denver & Rio Grande Western Railway Company, and to be secured by a trust deed upon the said mortgaged
50 railroad property after the said Young should have sold the same to the said, The Denver & Rio Grande Western Railway Company, for the said proposed bid of $50,000 cash, thereupon as complainant is informed and believes, and so charges the fact to be that the said named bondholders accepted said offer of the said, The Denver & Rio Grande Western Railway Company and agreed not to bid at sale but consented that the said Young should and would sell said mortgaged property to the said, The Denver & Rio Grande Western Railway Company on the said 29th day of December, 1881, for the only bid that was made, viz: said sum of $50,000 cash. Complainant further shows upon information and belief, that there were a large number of bonds not held by said named bondholders, who did not know of the said arrangement to prevent said

competition of bidding and received only their *pro rata* proportion of the said cash bid of $50,000, and that they did not receive even their distributive share of said $50,000 till several years after said foreclosure sale, and not then until the holders of said bonds made threats of instituting a suit for an accounting against said Young. Complainant further charges, upon information and belief, that the said, The Denver & Rio Grande Western Railway Company, at the time it received said deeds of conveyance of said railroad properties under said mortgage foreclosure sales, knew that the said railroad properties were being purchased at said inadequate prices, because in the case of the Bingham Cañon & Camp Floyd railroad the said railroad property was known to the officers of said, The Denver & Rio Grande Western Railway Company, to be worth at least $1,000,000, and earning six per cent. net annual interest on that sum, and in the case of the old Wasatch & Jordan Valley railroad, the said railroad property was known to the officers of
51 said, The Denver & Rio Grande Western Railway Company to be worth at least $800,000, and earning net six per cent. per annum on that amount. Complainant further shows, upon information and belief that in the said consolidation of said, The Denver & Rio Grande Western Railway Company with the said Colorado Company, the same persons who controlled the said, The Denver & Rio Grande Western Railway Company, at once became the officers of the said consolidated company, the said defendant, The Rio Grande Western Railway Company, and said officers at the time of said consolidation had knowledge of the said fraudulent scheme entered into between the officers of said, The Denver & Rio Grande Western Railway Company and said Scofield, and knew that at the time of said foreclosure, there was sufficient money from the net earnings of said consolidated company or said constituent railroads forming the defendant, The Wasatch & Jordan Valley Railroad Company, to pay the interest on said underlying mortgages, and said officers knew that said alleged default of interest was for the purpose of declaring the principal of said outlying bonds due and payable before the said bonds were actually due by their terms in order to enable said trustees to sell said mortgaged premises to said, The Denver & Rio Grande Western Railway Company, in the manner as was carried out as hereinbefore stated. Complainant further shows, upon information and belief, that the amount of the tolls, rents and income, and the rental value of the said railroad properties taken possession of and used by the said, The Denver & Rio Grande Western Railway Company, and the defendant, The Rio Grande Western Railway Company exceeds the amount of principal and interest of the outstanding bonds secured by said underlying mortgages but complainant shows, that whatever amount shall be found to be due upon said underlying mortgages on an accounting of said bonds and of the use and occupation of said
52 railroad being first had, he hereby offers to pay for the protection of the security of his said 579 bonds, as provided by the terms of said trust deed of May 1st, 1879, can be done.

Wherefore, complainant prays that it be decreed:

1. That said foreclosure sales, under said underlying mortgages by said George M. Young, by said Charles W. Scofield and George T. M. Davis, as trustees, be declared illegal and be set aside, and complainant be allowed to redeem on his own behalf and on behalf of the other bondholders secured by the said trust deed of May 1st, 1879, the railroad properties so sold upon paying the amount found to be due upon an accounting being first had.

2. That an accounting be had by the defendant, The Rio Grande Western Railway Company of the use and occupancy of the said mortgaged premises and of the said 11½ miles of extensions, not only while in its own possession, but while in the possession — the Denver & Rio Grande Western Railway Company, and that the said defendant, The Rio Grande Western Railway Company be decreed to pay the amount such accounting shall show to be due for the use and occupation of said property.

3. That an account be taken of the amount due of principal and interest on the said bonds outstanding secured by said trust deed of May 1st, 1879, and the said premises be decreed to be sold according to law and the rules and practice of this court, should the said defendant, The Wasatch & Jordan Valley Railroad Company, fail to pay upon a day to be named by this court, the amount found to be due upon said accounting being had.

4. That the defendant The Wasatch & Jordan Valley Railroad Company and all persons claiming under said last named company, may be barred and foreclosed of all right, claim, lien and
53 equity of redemption in and to the said mortgaged premises described in the said trust deed of May 1st, 1879.

5. That in the foreclosure sale of the property described in said trust deed of May 1st, 1879, said bonds issued and outstanding under said trust deed may be ratably received in payment by any purchaser or purchasers of said described mortgaged property, provided sufficient amount in cash be paid by said purchaser or purchasers to pay the costs and expenses of this action.

6. That a receiver be appointed at once to take possession of and operate said railroad property described in said trust deeds, May 1st, 1879, during the pendency of this suit, and that a writ of injunction be issued out of this court restraining the defendant, The Rio Grande Western Railway Company, its officers and agents from in any manner interfering with the receiver or disposing of said railroad properties during the pendency of this suit.

7. That complainant may have such other or different relief as may be just and equitable.

8. That writs of subpœnas be issued out of and under the seal of this court against the said defendants, The Wasatch & Jordan Val-

ley Railroad Company, The Rio Grande Western Railway Company, and The Union Trust Company of New York, as trustee, commanding them and each of them, by a certain day, to appear before your honors, in the court aforesaid, and then and there answer the premises and abide the order and decree of this court.

NATHANIEL W. RAPHAEL,
By CHARLES L. EASTON,
Of 302 Broadway, New York City, and
PIERCE, CRITCHLOW & BARRETTE,
His Solicitors, of Salt Lake City.

E. B. CRITCHLOW, *Of Counsel.*

54 UNITED STATES OF AMERICA,
Southern District of New York, } ss:
County of New York,

Nathaniel W. Raphael, being first duly sworn, doth depose and say, that he is the complainant in the foregoing bill in equity, and that he has read the same and knows the contents thereof, and that the same is true, except as to such matters stated therein upon information and belief, and as to those matters he states he believes them to be true; and further deponent saith not.

NATHANIEL W. RAPHAEL.

Subscribed and sworn to before me, this 31st day of December 1900.

THEREON DAVIS,
[SEAL.] *Notary Public, N. Y. Co.*

55 EXHIBIT "A."

This indenture, made and entered into this first day of May in the year one thousand eight hundred and seventy-nine by and between the Wasatch and Jordan Valley Railroad Company, a railroad corporation created by and under the laws of the Territory of Utah, party hereto of the first part, and the Union Trust Company of New York, trustee party of the second part witnesseth, That whereas in pursuance of the power and authority duly vested in them, the board of directors of the Wasatch & Jordan Valley Railroad Company, at a meeting of said board, held at Salt Lake City, in the Territory of Utah, on the first day of May, in the year one thousand eight hundred and seventy-nine, unanimously resolved to issue and negotiate a series of twelve hundred bonds of the Wasatch & Jordan Valley Railroad Company of one thousand dollars each amounting *to* the aggregate to twelve hundred thousand dollars to bear date May first, in the year one thousand eight hundred and seventy-nine, payable in the city of New York, twenty-five years after the date thereof, to wit: on the first day of May, in the year one thousand nine hundred and four, with interest thereon

as hereafter specified at the rate of seven per cent. per annum from the date thereof, payable on the first day of November, one thousand eight hundred and seventy-nine and semi-annually thereafter on the first days of May and November in each year in the city of New York on presentation and surrender of the respective coupons or interest warrants annexed to said bonds, both principal and interest payable in United States gold coin at par, and it was further unanimously resolved that the said bonds should be signed by the president and treasurer of the said company and that the corporate seal of the said company should be affixed to the said bonds;
56 that said bonds should not become obligatory unless a certificate on said bond, as hereinafter mentioned should be signed by the trustees hereinbefore mentioned or by its legal successor; and that the said bonds should all be of like tenor and in the following form:

UNITED STATES OF AMERICA, }
Territory of Utah. }

United States gold coin, $1,000.

No. — The Wasatch & Jordan Valley Railroad Company of the Territory of Utah, acknowledged themselves to be indebted to —— —— of —— or bearer, for value received in the sum of one thousand dollars in gold coin of the United States of America, which sum they promise to pay to the holder hereof, in the city of New York, twenty-five years after the date hereof, to wit: on first day of May, in the year one thousand nine hundred and four with interest thereon at the rate of seven per cent. per annum from the date hereof, payable on the first day of November, eighteen hundred and seventy-nine, and semi annually thereafter on the first days of May and November in each year in the city of New York on presentation and surrender of the respective coupons or interest warrants hereto annexed; both principal and interest payable in United States gold coin at par, this bond is one of a series of twelve hundred bonds of one thousand dollars each, numbered from one to twelve hundred inclusive, amounting in the aggregate to twelve hundred thousand dollars, all of the same tenor and bearing even date herewith.

The payment of which said bonds and coupons is secured by a first mortgage, bearing even date with said bond duly executed by the said company to the Union Trust Company of New York as trustee for the holders of said bonds upon the whole of their railroad line from Bingham precinct and thence by way of Sandy station to Granite, thence to Alta in Little Cottonwood cañon and also
57 from Granite to Big Cottonwood cañon, all in Salt Lake county in said Territory, and all the rolling stock, stations, fixtures, lands, franchises and personal property thereof now owned or hereafter to be acquired and which mortgage is recorded in the office of the recorder of Salt Lake county in said Territory.

This bond shall not become obligatory unless the certificate hereunder written is signed by the trustee.

In witness whereof, the said Wasatch & Jordan Valley Railroad Company have by unanimous resolution of the board of directors caused their corporate seal to be hereunto affixed, and the same to be signed by their president and treasurer, this first day of May, A. D. one thousand eight hundred and seventy-nine.

[SEAL.] (Signed) CHARLES W. SCOFIELD, *President.*
(Signed) H. W. H. FITZGERALD, *Treasurer.*

We hereby certify that the foregoing bond is one of the series described in the mortgage above within referred to

(Signed) UNION TRUST CO., *Trustee.*

And that to each of said bonds there should be attached fifty coupons, or interest warrants, numbered respectively from one to fifty inclusive, in the following form with the proper dates and numbers inserted, commencing November first, eighteen hundred and seventy-nine and semi annually thereafter.

$1,000. No. —.

Wasatch & Jordan Valley Railroad Company.

For bond No. —.

Interest coupon for thirty-five dollars —— due —— Payable in the city of New York.

(Signed) I. G. KENNEDY, *Secretary.*

58 And whereas, at said meeting of the board of directors of said company, it was further unanimously resolved that for the purpose of securing the payment of bonds with the coupons attached thereto, to be issued as aforesaid, that a mortgage by the said company be executed, to be sealed with the corporate seal of the said company and signed by the president and treasurer to the Union Trust Company of New York as trustee for the holder of said bonds upon the whole of the railroad line of the said company from Bingham precinct, by way of Sandy station to Granite, thence to Alta, and also from Granite to Big Cottonwood, in Salt Lake county in said Territory, and all the rolling stock, stations, fixtures, land, franchises and personal property thereof, now used, or hereafter acquired for use, on said line, and that after the said mortgage had been executed by the said company, the same should be properly recorded in the county of Salt Lake, in said Territory.

And it was further resolved that the said bonds, when executed, should be sold, hypothecated, or otherwise disposed of by the duly authorized officers and agents of said company, upon the most favorable terms, to be obtained for the payment of the debts and liabilities incurred by the said company in the construction and equipment of the road only so fast as the road shall be completed and not exceeding twenty thousand dollars to each completed mile of road,

as by the resolution of the said board of direction will more fully appear.

Now therefore, this indenture witnesseth, that the Wasatch & Jordan Valley Railroad Company for the better securing the payment of the principal and interest of the said bonds, according to the tenor thereof, and of the coupons thereto attached, on the days and at the place therein and herein prescribed for the payment thereof, and also in consideration of the sum of one dollar in hand paid by the said party of the second part, the receipt
59 whereof is hereby acknowledged have granted, bargained, sold, aliened, conveyed and confirmed and by these presents do grant, bargain, sell, alien, convey and confirm unto the said party of the second part and its successor duly appointed for the execution of the trusts herein set forth, and to its successors forever the following property, part of which is now and part of which is hereafter to be constructed, purchased, acquired, held, possessed and owned by the said company, to wit:

The railroad line of said company, commencing at Bingham precinct and running thence in an easterly direction by way of Sandy station on the Utah Southern railroad to Granite, thence easterly to Alta in Little Cottonwood cañon, and also from Granite in a northerly direction to Big Cottonwood cañon, in the county of Salt Lake, in said Territory, including therein the roadway and track, together with all the superstructure, depot ground, station houses, watering places, work shops, machine shops, machinery, side tracks, turnouts, turn-tables, weighing scales, fixtures, locomotives, tenders, rolling stock, fuel, equipments and all other property which is necessary, or ordinarily used in operating said railroad, and all rights and privileges of way or transit, which are now, or may be hereafter constructed, purchased, acquired, held, possessed or owned by said company, and pertaining to said line of railroad, and all corporate rights, privileges and franchise of said company, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, income, issue and profits thereof, with all the right, title, interest, estate, property, possession, claim and demand in law and in equity of said party of the first part of, in and to the same and every part and parcel thereof.

60 To have and to hold, the above granted and described premises, property and franchises with the appurtenances, unto the said party of the second part, and to its successors duly appointed upon trust, nevertheless and to and for the use and benefit of the person or persons, body or bodies, politic or corporate, who shall become, or be from time to time holders of the said bonds, or any of them issued or to be issued by the party of the first part as aforesaid, provided always and these presents are upon the express conditions, that if the said party of the first part, or its successors shall well and truly pay or cause to be paid unto the holders from time to time of said bonds, and each and every of them the said sums of money, secured to be paid by said bonds, and the interest

coupons attached thereto at the place and times, and in the manner set forth in the said bonds, according to the true intent and meaning thereof, then these presents, and all the property, estate, franchises and privileges herein and hereby granted and conveyed shall cease, determine and be void.

That until default shall have been made by the party of the first part in the payment of the principal or interest of said bonds, or some of them, or until default shall have been made in respect to something herein required to be done by said party of the first part, it shall be permitted to possess, use, occupy, manage and operate the said railroad property, franchise and appurtenances, and to renew, replace and repair the same, and every part thereof, and take, receive and use the tolls, rents, issues, incomes and profits thereof; and apply the same to the payment of the current expenses of the road, and to the purchase of the necessary machinery and equipment, or dispose of the same in any manner not consistent with the indenture, and the board of directors of said company may likewise distribute, and any net incomes to stockholders, after paying the interest on any and all bonds which said company may owe.

61 But if default shall be made in the payment of the said sums of money specified in said bonds, or in the payment of said interest coupons, or either of them, or any part thereof, and if the same shall remain unpaid for the period of six months, from and after the time when the same should have been paid, according to the terms of said bonds, then the said party of the second part, or its successors in the said trust, by itself or its agents or servants in its behalf, may upon request of the holders of not less than four hundred of said bonds, on which the interest or principal shall so be and have remained in default as aforesaid, enter into and upon, and take possession of all, or in its, or in their, or his direction, any part of the said premises and property hereinbefore described, and work and operate the said railroad, and receive the income, receipts and profits thereof, and out of the same pay.

First. The expenses of running and operating the same, including therein such reasonable compensations as it or they or he may allow to the several persons employed and engaged in running and superintendance of the same, and all taxes, assessments, charges or liens, having any preference to the lien of these presents, upon the said premises, or any part thereof; and a reasonable compensation to the party of the second part, or its successors for its, or their care, diligence and responsibility in the premises, and for the services of such attorneys and counsel as may have been, by it, or them employed, and

Second. The expenses of keeping the said road and appurtenances, the locomotives and the rolling stock thereof in good order and sufficient repairs to prevent deterioration in the value thereof, and all other reasonable and proper charges and expenses of the care and management thereof, and

Third. Pay at par as the same *with* suffice all interest on the

62 said bonds in the order in which such interest shall become due, ratably to the holder of the coupons evidencing the right to such interest; and after paying all interest, which shall have become due, to apply the said moneys to the payment of the principal as such of said bonds as may be at that time unpaid, ratably, and without discrimination or performance; and if after satisfaction thereof a surplus shall remain to pay over such surplus to the said company, its successors or assigns, or as any court of competent jurisdiction shall order and direct; or in case default shall be made as aforesaid and continue as aforesaid, it shall likewise be lawful for the said trustee, or its successors, after entry as aforesaid, or without entry, personally, or by its agents or attorneys, to sell and dispose of all and singular the railroad, tenor, rights, property, privileges, franchises, real and personal and other premises hereby conveyed or intended, so to be, with the appurtenances, or so much as may be necessary at public auction in New York city, at such time as the trustee, or its successors shall designate, and having first given notice of the place and of the time of such sale by advertisement, published not less than once a week, for six weeks successively, in two newspapers, published in the city of New York, and also in one newspaper published in Salt Lake City, in said Territory, and to adjourn the sale from time to time in its, or their discretion, and if so adjourned, to make the sale without further notice at the same time and place to which the same may be adjourned, and to make, execute and deliver to the purchaser or purchasers of said premises, good and sufficient deed or deeds, in fee simple, assignments or other transfers, good in law for the same and any part thereof, which sale made as aforesaid, shall be a perpetual bar, both in law and equity, against the said party of the first part, its successors and assigns, and all

63 other persons claiming, or to claim the said premises, or any part thereof, by from, through or under the said party of the first part, its successors or assigns; and after deducting from the proceeds of such sale, just allowance for all expenses thereof, including attorneys' fees, and all other expenses, advances and liabilities, which may have been made or incurred by the said trustee, in respect to the said lands or property, or any part or parcel thereof, or in operating or maintaining the said railroad or any part thereof, or in managing the business thereof, while in its, or their possession, and in preparing for and completing the sale aforesaid, or in the performance of any of the trusts herein contained, and all payments which may have been made by it, or them, for taxes or assessments and for charges or liens prior to the lien of these presents on said premises or any part thereof, together with a reasonable compensation for its, or their own services in the execution of this trust, to apply the remaining proceeds of sale to the payment of the interest which shall at the time have accrued on said bonds secured by these presents, or so many of them as shall have been issued by said party of the first part, and be then outstanding, *pro rata*, until all such interest shall be paid, and afterwards to apply the remainder to the payment of the principal of said bonds *pro rata*; until such

principal shall be paid; and if after payment of such principal and interest in full there shall remain any surplus, pay over such surplus to the said party of first part, its successors or assigns, or to such person or persons, as may be ordered or directed by any court of competent jurisdiction to receive the same, and the party of the first part do hereby declare and agree that the receipt of the trustee shall be a full and sufficient discharge to the purchaser or purchasers of the premises, to be sold as aforesaid, and that the said purchasers having paid the purchase money, shall not be liable to see to the application thereof, to or upon the trusts herein contained, or be answerable for any loss or misapplication or non-application of said purchase money or any part thereof, or be obliged to enquire into the necesssity, propriety or authority of, or for any such sale at the sale of the aforesaid property or any part thereof, whether made under and by virtue of the power hereby granted, or by judicial authority.

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The bonds issued by the party of the first part and hereby secured, with the past due and unpaid coupons, shall be ratably received in payment from any purchaser or purchasers by said trustee or its successors at the option of the holder thereof, and at any such sale the trustee may in its discretion bid for and purchase or cause to be bidden for and purchased the property so sold, or any part thereof, in behalf of the holder of the bonds secured by these presents, and then outstanding in the proportion of the respective interests of such bond holders at a reasonable price, if but a part of the property shall be sold, or if the whole be sold at a price not exceeding the whole amount of the bonds then outstanding with the accrued interest thereon.

In case default shall be made in payment of any half year's interest, on any of said bonds, at the time and in the manner provided in the coupons issued therewith, the said coupons having been presented and payment of the interest thereon specified having been demanded, and such default shall continue for the period of six months after the said coupons shall have been due and been demanded as aforesaid; then and thereupon, the principal of all the said bonds shall at the option or election of the trustee become immediately due and payable, anything in such bonds to the contrary notwithstanding.

But at any time the interest in arrear shall be paid a majority in the interest of the holders of said bonds may by an instrument in writing under their hands and seals instruct the trustee to declare the principal to be due, or to waive the right so to declare on such terms and conditions as such majority in interest shall deem proper, or may annul or reverse any declared election of the said trustee in that respect; provided, that no inaction of the trustee or bondholders shall extend to or be taken to affect any subsequent default, or impair the rights resulting therefrom. And the said party of the first part hereby agrees and covenants to and with the said party of the second part and its successors in said trust, that it will pay all ordinary and extraordinary taxes, assess-

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ments and other public burdens and charges which shall or may be imposed upon the property herein described, and hereby mortgaged and every part thereof, and the said party of the second part, or its successors in said trust or any one or more of the holders of said bonds, may, in case of the default of the said party of the first part, in this behalf, pay and discharge the same and any other lien or incumbrance upon said property, which may in any way, either in law or equity be or become in effect a charge or lien thereon, prior to these presents, or to which this mortgage may be subject or subordinate.

And for all payments thus made the parties so making the same shall be allowed interest thereon at the rate of seven per cent. per annum, and each payment, with the interest thereon, shall be and are hereby secured to them by these presents, and declared to be payable and collectible in the same sort of currency or money wherein they shall have been paid; and the same shall be payable by the said party of the first part, to said party of the second part, in trust for the party or parties paying the same upon demand, and may be paid out of the proceeds of the sale of said property and franchises hereinbefore provided, and the said trustees shall also in its discretion, have full power to convey or realize upon the written request of the said Wasatch & Jordan Valley Railroad Company, any lands acquired or held for the purpose of stations, shops or other buildings.

And shall also have power to convey or release as aforesaid any lands or property which in its judgment shall not be necessary for use in connection with said railroad, or which may have been held for a supply of fuel, gravel or other materials, and also to convey or release as aforesaid, or like request, any lands not occupied by the track, which may have become disused by reason of a change in the location of the track, or any station house, depot or other adjacent building connected with said railroad, or any part thereof, and such lands not occupied by the track, and adjacent to such station house, depot, shop or other building, as the said company may deem expedient to disuse or abandon by reason of such change, and to consent to any such change or to such other changes in the location of the track or depot or other buildings as in its judgment have become expedient, and to make and deliver the instrument or conveyance necessary or proper to carry the same into effect. But any lands which may be acquired for permanent use in substitution for those so released shall be conveyed to the said trustee upon the trusts of these presents, and the trustee shall also have full power to allow the said company from time to time, to dispose of according to its discretion such portions of its equipment, machinery and implements at any time held or acquired for the use of the said railroad as may become unfit for use, or for any reason desirable to be changed, replacing the same by others of at least equal value, which shall be conveyed by the said company to the said trustee; or to be otherwise made subject to the lien and operation of these presents.

It shall be the duty of the trustee to exercise the power of entry or the power of sale, hereby granted or both, or to proceed by suit or suits at law, or in equity, to enforce the rights of the bond-
67 holders, in case of default herein specified, in the manner and subject to the qualifications herein expressed, upon the requisition of the bondholders herein required, as follows:

First. If the default be in the non-payment of interest or principal of any of the said bonds, upon the written requisition of any holder or holders, of not less than four hundred of said bonds and a proper indemnification of such holder or holders to the trustee against the cost and expenses to be incurred, it shall be the duty of the trustee to enforce the rights of the bondholders under these presents by entry or sale under the power herein contained or both, or by suit or suits at law, or in equity, as it, being advised by counsel learned in the law, shall deem most expedient for the interest of the bondholders, or

Second. If the default be in the omission of any act or thing required by these presents, for further assuring the title of the trustee to any property or franchise now possessed or hereafter acquired or in the omission to comply with any provision of these presents, to be observed, kept, or performed by the said company, then, and in either of such cases the trustees may in its discretion enforce and upon the requisition as aforesaid of a majority in interest, of the said holders of the bonds hereby secured, it shall be its duty to enforce the rights of the bondholders, by reason of such default the said trustee, being indemnified by the bondholders against costs and expenses, subject to the power hereby declared in any of the above cases.

If a majority in interest of the holders of the said bonds by requisition in writing under their hands and seals, to instruct the said trustee to waive such default upon the actual payment of the interest in arrear with the interest thereon or other compliance with the provisions herein contained, and payment of the expenses
68 incurred by reason of such default, or adequate indemnity as aforesaid, to enforce the rights of the bondholders by reason thereof, provided that no action of the said trustee or bondholders or both, in waiving such default or otherwise, shall extend to or be deemed to affect, any subsequent default or to impair the rights resulting therefrom.

It is mutually agreed and understood that said trustees shall be entitled to just compensation for all services which it may hereafter render in the execution of this trust, to be paid by said company or out of the income of the property, and for that purpose may at any time apply to the courts, without notice to any person except the said party of the first part, their successors or assigns, that said trustee or any successor may resign or discharge itself or himself of the trust hereby created by notice in writing to the said company; three months before such resignation shall take effect or such shorter notice as said company shall accept a sufficient notice, and upon due execution of the conveyances hereinafter required. And in case

the said trustee or any trustee hereafter appointed shall cease to exist, die, resign, or become incapable of acting, or unfit to act, in the said trust, a successor to such shall be appointed by the said company with the written consent of a majority in interest of the said bondholders.

And the trustee so appointed shall thereupon be vested with all the powers, authorities and estate granted to or conferred upon the party of the second part by these presents, and all the rights and interests requisite to enable him to execute the purpose of this trust without any further assurance or conveyance.

And upon the resignation or removal by any court of competent jurisdiction of any trustee, or an appointment in its or his place in pursuance of these presents, all its or his power and authority
69 by virtue hereof shall cease, and all the estate, right, title and interest in the said premises of any trustee so resigning or being removed, shall wholly cease and determine.

But the said trustee so resigning or being removed shall, on the written request of the new trustee who may be appointed, immediately execute a deed or deeds of conveyance to vest in such new trustee and upon the trusts herein expressed, all the property, rights and franchises which may be at that time held upon the said trusts; provided nevertheless, and it is hereby declared and agreed that, in case it shall at any time hereafter prove impracticable after reasonable exertion, to appoint in the manner hereinbefore provided, a successor to fill any vacancy which may occur in said trust application, in behalf of the holders of the bonds secured hereby may be made by the holders of such bonds to the amount of one hundred thousand dollars to the district court for the third judicial district of said Territory, in which district the said railroad is situated, or to any other court of competent jurisdiction, for the appointment of a new trustee. And the trustee or trustees when so appointed, shall become vested with all the powers, authorities, and estate granted to or conferred upon the party of the second part by these presents.

And the said party of the first part for itself and its successors and assigns, in consideration of the premises and of one dollar to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, hereby covenants and agrees to and with the said party of the second part and its successors and assigns, that whenever and as often as the said party of the first part, its successors and assigns, shall acquire any lands, equipments or other property or thing of whatever name or nature, for use in connection with said railroad between the points aforesaid or any part
70 thereof, the said party of the first part, its successors and assigns shall and will acquire, possess, and hold the same and every part and parcel thereof upon and subject to the trust of this indenture, until conveyance thereof shall be duly made and delivered to the said party of the second part or its successors in said trust, pursuant to the next mentioned covenant.

And the said party of the first part, for itself, its successors and assigns, for the consideration aforesaid, further covenants and agrees to and with the said party of the second part and its successors and assigns, that the said party of the first part, its successors and assigns, shall and will from time to time and at the times hereafter, and as often as thereunto requested by the trustee under this indenture, execute, acknowledge and deliver all such further deeds conveyances and assurances in the law for the better assuring unto the said party of the second part and its successors in said trust upon the trusts herein expressed the said railroad between the points aforesaid, together with all the appurtenances and property hereinbefore mentioned and appertaining thereto, and to which the said company are or may hereafter for any reason, become entitled, or which it or its successors or assigns may in any manner acquire for use between the points aforesaid, as by the said trustee or its counsel learned in the law, shall be reasonably advised or required.

And it is also mutually understood and agreed between the parties hereto that the said party of the second part and its successors in said trust shall be accountable, liable or responsible for reasonable care and diligence only in the performance of the trusts hereby created.

And in the management of the said estate and property in like manner as a *bailee* without reward, and shall not be liable, accountable or responsible for the acts of any agent, depositary, or substitute employed by it or them, when such agent, depositary or
71 substitute shall have been selected with reasonable discretion.

And the said party of the second part hereby accepts the trusts created and declared by this indenture, and agree- to discharge the same pursuant to the provisions in that behalf therein contained.

In witness whereof, the said parties have caused their respective corporate seal- to be hereto affixed, and these presents to be signed by the president and treasurer respectively of said railroad company and the president and secretary of said Union Trust Company, the day and year first above written.

[CORPORATE SEAL.] WASATCH & JORDAN VALLEY RAIL ROAD CO.
C. W. SCOFIELD, *President.*
H. W. FITZ GERALD, *Treasurer.*

[CORPORATE SEAL.] UNION TRUST COMPANY OF NEW YORK,
By EDW'D KING, *President.*

Attest: JAS. H. OGILVIE.

Signed, sealed and delivered in presence of
WILLIAM H. CLARKSON.
HERMAN SULING.

CITY AND COUNTY OF NEW YORK, } ss:
State of New York, }

Be it remembered that on this 27th day of May, A. D. 1879, before me, William H. Clarkson, a notary public of the State of New York, in and for the county of New York, residing in the said city of New York, personally appeared C. W. Scofield, the president of the Wasatch and Jordan Valley Rail Road Company, and H. W. H. Fitz Gerald, the treasurer of the same company, and, being by me duly sworn, they did depose and say that they are the above
72 described officers of the said company; that the seal affixed to the foregoing instrument purporting to be the corporate seal of said company is such corporate seal; that it was affixed thereto by order of the board of directors of said company, and that they signed their names thereto by the like order as the president and treasurer of said company respectively;

And the said C. W. Scofield and H. W. H. Fitz Gerald, who are personally known to me to be the individuals described in and who executed the foregoing instrument, also acknowledged to me that they executed the same freely and voluntarily, and that the same was their free act and deed as the president and treasurer respectively of said company and the free act and deed of the said company.

And on the same day, before me also, personally appeared Edward King, the president of the Union Trust Company of New York, and James H. Ogilvie, the secretary of the same company, also being by me duly sworn, they did depose and say that they are the above described officers of the said company; that the seal affixed to the foregoing instrument, purporting to be the corporate seal of said company, is such corporate seal; that it was affixed thereto by order of the board of trustees of the said company, and that they signed their names thereto by the like order as the president and secretary of the said company. And the said Edward King and James H. Ogilvie, who are personally known to me to be the individuals described in, and who executed the foregoing instrument, also acknowledged to me that they executed the same freely and voluntarily, and that the same was their free act and deed and the free act and deed of the said company.

73 In witness whereof, I have hereunto set my hand and affixed my official seal, this 27th day of *of* May, A. D. 1879.

[SEAL.] WILLIAM H. CLARKSON,
Notary Public for New York County, N. Y.,
117 *Broadway, N. Y. City.*

Recorded June 2nd, 1879, at 10.25 a. m.

Certificate.

STATE OF UTAH, } ss:
County of Salt Lake, }

I, James C. Jensen, county recorder in and for said county, duly qualified, commissioned and acting, do hereby certify that the above

and foregoing instrument of writing, consisting of fifteen sheets, numbered from one to fifteen inclusively, is a full, true and correct copy of that certain mortgage, wherein the Wasatch & Jordan Valley Railroad Company appears as party of the first part, and the Union Trust Company of New York, trustee, appears as party of the second part, as the same appears of record in Book "H" of Mortgages, at pages 303 to 313 inclusive, records of Salt Lake county, Utah.

Witness my hand and official seal at Salt Lake City, Utah, this twentieth (20th) day of October, A. D., 1899.

[SEAL.] J. C. JENSON,
County Recorder.

10 ct. rev. stamp.
I. J. P. & E. H. J.

74 EXHIBIT B.

In the U. S. Circuit Court for the Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant,
ag'st
SPENCER TRASK ET AL., Defendants. } In Equity.

In the Circuit Court of the United States for the District of Utah.

NATHANIEL W. RAPHAEL, Complainant,
against
WASATCH & JORDAN VALLEY RAILROAD Company, The Rio Grande Western Railway Company, Union Trust Company of New York, Trustee, and Others, Defendants. } In Equity. No. 394.

Separate Answer of the Rio Grande Western Railway Company.

Bennett, Howat, Sutherland & Van Cott, solicitors for the defendant The Rio Grande Western Railway Company.
Robert Harkness, of counsel.

U. S. circuit court, Filed Ap'l 30–1901.
JOHN A. SHIELDS, *Clerk.*

75 In the Circuit Court of the United States for the District of Utah.

NATHANIEL W. RAPHAEL, Complainant,
versus
WASATCH & JORDAN VALLEY RAILROAD COMPANY, The Rio Grande Western Railway Company, and Union Trust Company of New York, as Trustee, Defendants. } In Equity.

Separate Answer of the Rio Grande Western Railway Company.

The defendant, The Rio Grande Western Railway Company, saving and reserving to itself all manner of benefit or advantage of exception or otherwise that can or may be taken to the many errors, uncertainties and imperfections of the bill of complaint herein, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for it to make answer to, separately answering, says:

It admits that prior to April, 1879, there existed a railroad corporation organized under the laws of the Territory of Utah in the name Wasatch & Jordan Valley Railroad Company, and that it owned a certain line of railroad and tramway in Salt Lake county, Utah, more particularly hereinafter described. And this defendant says, upon information and belief, that said railroad company was organized on or about the 26th day of October, 1872, and from the time of its organization had franchises and powers to construct and operate lines of railroad and tramway on and over routes as follows:

76 From a point at or near Sandy station on the (then) Utah Southern railroad, easterly by the most desirable route to the mouth of Little Cottonwood cañon, thence easterly through said cañon to some convenient terminal point, all in Salt Lake county, Utah, and the length of the contemplated railroad being thirty (30) miles, more or less;

And that in, or prior to the year 1873, the said railroad company constructed and commenced operating a line of narrow gauge steam power railroad from the initial point of said routes at Sandy on the Utah Southern railway (now known as the Oregon Short Line railroad) easterly to Wasatch station, above the mouth of Little Cottonwood cañon, a distance of eight miles, and thence constructed in 1875 and operated a railroad tramway up the cañon and to or near to Alta in said cañon a further distance of about eight miles, making a total length of railroad and railroad tramway of about sixteen (16) miles; and that no further extension of or addition to the length of said railroad or railroad tramway has ever been made.

This defendant admits and on information and belief alleges that the said Wasatch & Jordan Valley Railroad Company (which for distinction and brevity will be hereinafter referred to as the "old

Wasatch Company") by its trust deed dated April 10th, 1873, conveyed by way of mortgage to Augustus Kountze and Wm. A. Hall, as trustees, its aforesaid line of railroad and tramway to secure the payment of seven hundred and ten (710) bonds of the old Wasatch Company of the denomination of five hundred dollars ($500) each, bearing date April 10th, 1873, and aggregating three hundred and fifty-five thousand dollars ($355,000) of bonds payable May 1st, 1893, with interest at the rate of nine per cent. per annum, which mortgage was duly recorded on 21st June, 1873, in the office of the recorder of Salt Lake county. And on information and belief this defendant further alleges that said trust deed conveyed to said trustees jointly and not in common, and to their survivors and successors and successor in the trusts appointed as in said trust deed pro-
77 vided, and to his or their assigns, all the franchises and line of railroad and tramway of said old Wasatch Company, then constructed or to be thereafter constructed or acquired, with all rights of way and property, real or personal, used or for use thereon or appurtenant thereto; that of said series of bonds the said old Wasatch Company, issued and negotiated six hundred and ninety (690) bonds, each for the principal sum of five hundred dollars ($500); and that no larger number of bonds was ever issued or negotiated or the payment thereof secured by said deed of trust.

This defendant admits the alleged organization and existence of the Bingham Cañon & Camp Floyd Railway Company, and that it owned a line of railroad as hereinafter described.

And this defendant alleges on information and belief that said last named company was organized on or about the 10th day of September, 1872, with franchises and powers to construct, own and operate a line of railroad from Sandy station on the line of the Utah Southern (now Oregon Short Line) railroad westerly through Bingham cañon in Salt Lake county, and through or near to Ophir City to the town of Lewiston in the Camp Floyd mining district, Utah Territory, a distance of about thirty-five miles.

And on information and belief this defendant says, that in the years 1872 and 1873 the said company surveyed for, located, constructed and commenced operating a line of steam narrow gauge railroad, from its terminus at Sandy, westerly to and up the Bingham cañon for a distance of sixteen and thirteen-one-hundredths ($16\frac{13}{100}$) miles and in 1875, constructed a railroad tramway, in extension of its steam power road for the further distance of two and seventy-six-one-hundredths ($2\frac{76}{100}$) miles and commenced the operation of the same.

This defendant admits and on information and belief alleges the execution, delivery and record of the trust deed stated in the bill of complaint, by the said Bingham Cañon & Camp Floyd Railway Company to Charles W. Scofield and George T. M. Davis as trustees, dated June 3rd, 1874, for the purpose, which was therein
78 stated, of securing the payment of three hundred bonds of said last mentioned company of the denomination of one thousand dollars ($1,000) each, dated June 3rd, 1874, and payable

July 1st, 1894, with interest thereon at eight (8) per cent. per annum, payable July 1st and January 1st in each and every year from the date of said bonds.

And on information and belief this defendant further alleges that the whole number of bonds secured thereby, that is to say, three hundred thousand dollars ($300,000) in par value, was issued and negotiated by said company; that said trust deed conveyed all the line of railroad and railroad tramway constructed or to be constructed or acquired by the company with the franchise therefor, and all appurtenances and property, real or personal, connected therewith, for a distance of twenty miles from Sandy aforesaid, to and up the Bingham cañon; and that the said trust deed did not cover the franchise or any length of said railroad which might be constructed in extension for a greater distance than twenty (20) miles from Sandy. But this defendant denies that said trust deed provided that the three hundred thousand dollars ($300,000) in bonds should not cover extensions beyond the terminal of the then constructed railroad and within twenty (20) miles from Sandy aforesaid.

And on information and belief this defendant denies that said Bingham Cañon & Camp Floyd Company after the execution, or after the recording of said trust deed, or before the alleged consolidation, or at any time, extended its said railroad line westerly from the location of the depot building in Bingham for a distance of eleven and one-half (11½) miles of tramway, or for any distance more than two and seventy-six one hundredths ($2\frac{76}{100}$) miles, or that the western terminal of the said lines, at the time it made its trust deed was at the station building in Bingham, or that said company made any extension of railroad or tramway westerly after about the year 1875, or that the extensions alleged in the bill of complaint, or any extensions of railroad or tramway made by said company after the
79 execution of its trust deed, became a part of the alleged consolidated railroad or of the railroad of said Bingham Cañon & Camp Floyd Railway Company free from the lien of its trust deed of June 3rd, 1874.

And this defendant further answering avers, upon information and belief:

That the Denver & Rio Grande Western Railway Company mentioned in the bill of complaint, was organized under the laws of the Territory of Utah on or about the 21st day of July, 1881, by the consolidation of various Utah railway companies, and had franchises and powers to acquire, construct, own and operate various lines of railroad, the routes of which covered a large mileage, and that, by amendment to its articles of incorporation, made March 2nd, 1882, and filed April 11th, 1882, it acquired franchises and powers to acquire, construct, own and operate lines of railroad as follows:

(*a.*) A branch line of railroad beginning at a point on the line of route of the company's railway between Salt Lake City and Draperville, and about eleven miles southerly from Salt Lake City, thence running westerly to and through Bingham cañon to a point at or near the Jordan mine in the West Mountain mining district, a dis-

tance of about twenty miles, all in Salt Lake county, Territory of Utah.

(*b.*) A branch line of railway beginning at a point on the line of route of the company's railway between Salt Lake City and Draperville, about twelve miles southerly from Salt Lake City, thence running easterly to and through Little Cottonwood cañon to a point at or near Alta City, a distance of about twenty miles, with a branch from a point at or near the mouth of Little Cottonwood cañon to and through Big Cottonwood cañon a further distance of about fifteen miles, all in Salt Lake county, Territory of Utah.

And this defendant further alleges upon information and belief that the point of beginning of both lines last described is a point on this defendant's main line called Bingham junction and by the line of railroad about two miles westerly from Sandy and the former junction of the Bingham Cañon & Camp Floyd railroad with
80 the Utah Southern railroad; that line (*a*) above described covers the line of route of the Bingham Cañon & Camp Floyd railroad described in its trust deed of June 3rd, 1874, and an extension thereof of about two miles at the westerly end, but omits from the line described in said trust deed of June 3rd, 1874, about two miles at the easterly end from Bingham junction to Sandy and a connection with the old Utah Southern railroad; that the line and route (*b*) above described covers and includes the line of route of the old Wasatch Company, as described in its trust deed of April 10th, 1873, and about two miles westerly from Sandy to Bingham junction, and being the easterly two miles of the line described in the trust deed of the Bingham Cañon & Camp Floyd railroad of June 3rd, 1874; and that said route (*b*) also includes a line branching from the old Wasatch Company's route and extending to Big Cottonwood cañon which has never been constructed.

And this defendant on information and belief further avers that prior to the organization of the Denver & Rio Grande Western Railway Co. and ever since there had and has existed a corporation organized under the laws of Colorado, by the name of "the Rio Grande Western Construction Company," and with franchises and powers to acquire, construct, equip and incidentally operate until sold, lines of railroad in Colorado, Utah and elsewhere, and to lease, sell or otherwise dispose of the same to railroad companies; that said construction company prior to the organization of the Denver & Rio Grande Western Railway Company had contracted with and was doing construction work for the constituent railroad companies by the consolidation of which said last named railway company was organized, for which the construction company was to be paid in bonds and stock of said companies, and upon its organization the Denver & Rio Grande Western Railway Company assumed the contracts and obligations of such constituent companies; that after its organization the said The Denver & Rio Grande Western Railway Company, being without means to construct its lines of railroad otherwise than by the use of bonds, the payment of which should be secured by a lien on its railroad, provided for an issue of

81 bonds to pay the assumed obligations of its constituent companies, and to construct and equip its lines of railroad,—the bonds to be payable to bearer, issued at the rate of sixteen thousand dollars ($16,000) per mile of constructed railroad, to bear interest at the rate of six (6) per cent. per annum, payable semi-annually, and both principal and interest payable in gold coin; that to secure the payment of the said bonds, the said company, by trust deed dated Aug. 1, 1881, conveyed to Louis H. Meyer, as trustee, all its franchises and authorized lines of railroad acquired or constructed or which should be acquired or constructed and all the appurtenances thereto then or thereafter owned or acquired, including rights of way, stations and buildings, and all property real and personal, at any time connected with or for use with said railroad lines; that said company from time to time and prior to the organization of this defendant, issued and sold negotiable bonds so secured; that the same were purchased in good faith and held by numerous persons and parties in the United States and Europe; that at the time of the organization of this defendant the amount so issued and sold including funded unpaid interest coupons, amounted to six million nine hundred thousand — ($6,900,000); and that with the avails of said bonds and also by use of its capital stock, sold with the bonds or otherwise, the said company had acquired or constructed and owned a large mileage of narrow gauge railroad, with the appurtenances.

And on information and belief this defendant avers, that soon after the organization of the Denver & Rio Grande Western Railway Company, and at the same time that it executed its said trust deed to secure said bonds, it made an agreement dated August 1st, 1881, with the Rio Grande Western Construction Company, by which the latter mainly in consideration of sixteen thousand dollars ($16,000) per mile in said bonds of said railway company, to be paid as well in respect to mileage constructed or in process of construction for said constituent companies, as for the mileage thereafter constructed,

82 agreed to procure all rights of way, and grounds required, make surveys for and construct and equip in good condition and ready for operation, and deliver to the said railway company in sections, all the lines of railroad the construction of which had been made or commenced for said constituent companies, and all lines of railroad designated by the railway company for construction; and that a copy of said agreement is annexed hereto, made a part of this answer, marked Exhibit "A" and referred to as fully as if incorporated herein.

And this defendant further alleges upon information and belief that the Denver & Rio Grande Western Railway Company in some way and under said contract indicated to the construction company that it would accept lines of railroad acquired and completed in accordance with said contract, on and over the routes aforesaid, one commencing at Bingham junction and extending westerly to and up Bingham cañon, a length of twenty miles, more or less, and one commencing at Bingham junction aforesaid and running easterly to

Wasatch, near the mouth of Little Cottonwood cañon, and thence up the cañon to Alta, a distance of eighteen miles more or less, all in Salt Lake county, Utah; that said construction company, with a view to acquire, complete, put in the good condition required, and deliver to the said railroad company a line of railroad on and over said routes, proceeded to arrange for the purchase, and purchased, the lines of railroad included in and sold under the trust deed of the Bingham Cañon & Camp Floyd Railway Company dated June 3rd, 1874, and sold under the trust deed of the old Wasatch Company, dated April 10, 1873; that the railroad of the old Wasatch Company was purchased at the foreclosure sale thereof by one William M. Spackman who was, and therein acted as, an agent of the Rio Grande Western Construction Company; that the railroad of the Bingham Cañon and Camp Floyd Railway Company was purchased at the foreclosure sale of said railroad by one Charles F. Woerishoffer, who thereafter transferred and sold to the said construction company all of his rights under his said bid; that the deeds, though made
83 directly to the Denver & Rio Grande Western Company, were so made to avoid a second transfer, and by the direction of the construction company, and with a view to further and carry out the performance of its contract dated August 1st 1881; that said deed of the old Wasatch Company's line was not made or delivered to the Denver & Rio Grande Western Railway Company until after June 15th, 1882, or the deed of the Bingham Cañon & Camp Floyd Railway Company delivered or accepted until the 11th or 12th day of April, 1882, and that upon the delivery of said deeds the Denver & Rio Grande Western Railway Company paid the said construction company as provided in their contract, the agreed mileage consideration in bonds and stock, and became a purchaser in good faith and without any notice or knowledge of the alleged or any frauds, irregularities or defects in the sales, or as inducements to the sales.

And this defendant admitting the sale of the mortgaged railroad of the old Wasatch Company by George M. Young, as trustee, at or about the time and for the amount alleged, and the deed by the said trustee, denies on information and belief that the sale was made to the Denver & Rio Grande Western Railway Company, or to any one as an agent or officer of said company; but this defendant on information and belief alleges that the bid was made by and the sale was ostensibly made to one William M. Spackman, who was and therein acted solely as the agent of the Rio Grande Western Construction Company, though said Spackman was at that time also treasurer of the Denver & Rio Grande Western Railway Company, and that said purchase was made by the said construction company, and afterwards by its direction the deed was made as hereinbefore set forth.

This defendant admits the sale of the mortgaged railroad of the Bingham Cañon & Camp Floyd Railway Co. by trustees at or about the time and place and for the bid and under the trust deed stated in the bill of complaint; but denies that said sale purported to be made or was made to the Denver & Rio Grande Western Railway

Company, and avers upon information and belief that the sale
84 was made to one Charles F. Woerishoffer, acting in his own right; that he then owned and held the said three hundred (300) bonds secured by the said trust deed of the Bingham Cañon & Camp Floyd Railway Company, and that the said Woerishoffer's purchase and bid and the bonds so held by him were after the formal sale but before its consummation by deed, purchased from him and the full price therefor in good faith paid to him by said construction company, and that at its request, and in furtherance of its contract with the Denver & Rio Grande Western Railway Company said bid was transferred to the last named company, and that on or about April 11th, 1882, the deed of the trustees was delivered in behalf of the said construction company to the said railway company as above stated.

And this defendant denies that said deed conveyed only about sixteen (16) miles of railroad, or included as part of the mileage conveyed about four (4) miles of spurs at Sandy; but defendant avers that said deed conveyed all the interest of said Bingham Cañon & Camp Floyd Railway Company, in twenty (20) miles of railroad westerly from Sandy, with all spurs and other appurtenances.

This defendant admits that in or about August, 1882, being soon after the delivery of said deeds to the Denver & Rio Grande Western Railway Company, it received and took from the said construction company (or from the receiver then holding the same for or subject to accounting therefor to the construction company) the possession of the railroads and railroad tramways conveyed, so far as there were constructed railroads or tramways on the lines purporting to be conveyed, and remained in possession as owner during the existence of the said Denver and Rio Grande Western Company; but this defendant denies that the Denver & Rio Grande Western Railway Company took possession of eleven and one-half (11½) miles or any length of tramway extension from the western terminal, or of any tramway extension beyond twenty (20) miles from Sandy, or of any tramway not included in the trust deeds; or that the lines of steam power railroad of which it took possession amounted to about
85 thirty-three (33) miles, or more than twenty-four (24) miles; or that it took possession of four (4) miles of spurs at or near Sandy, or any spurs not appurtenant to the main lines and parts thereof.

And this defendant alleges and shows that from and after the time the Denver & Rio Grande Western Railway Company took possession of said railroads as aforesaid, and until this defendant company was organized and took possession thereof as hereinafter alleged, the Denver & Rio Grande Western Railway Company had and held as owner, under claim of title exclusive of any other right, the exclusive, open, uninterrupted, peaceable and adverse possession of all said railroads and tramways included in the convenances aforesaid, and of all the said line of railroad and tramway from Sandy westerly to and up Bingham cañon for a distance of twenty (20) miles from Sandy, and of all the line of railroad and tramway,

from Sandy aforesaid to and up Little Cottonwood cañon to Alta, with the spurs, side tracks and all appurtenances, and all property, real and personal pertaining thereto, and that, during its possession it paid all taxes and assessments thereon, expended large sums of money in improving said lines and made or caused to be made in the exercise of its own franchises some branches from and extensions of said tramway to mines in Bingham cañon.

This defendant admits its organization as a consolidated railroad company, substantially as set out in the bill of complaint, and further alleges and shows, upon information and belief, that it was organized on or about May 16th, 1889, and took all the franchises and property of its constituent companies, including the lines of railroad and tramway easterly and westerly from Sandy, but denies there existed or it took possession of eleven and one-half (11½) miles of extension or any extensions except as stated. This defendant further alleges upon its information and belief that by its agreement of organization as well as by force of law, this defendant assumed and agreed to pay all the debts and obligations of said constituent companies, and also assumed their capital stock obligations and cancelled the stock of the constituent companies by exchanging its own
86 therefor; that the Denver & Rio Grande Western Railway Company, under its aforesaid trust deed to Louis H. Meyer, had, prior to May 15th, 1889, issued and negotiated bonds payable to bearer to the amount of six million nine hundred thousand dollars ($6,900,000), and at the rate of about eighteen thousand five hundred dollars ($18,500) per mile for its constructed railroads, and was also indebted on interest coupons and certificates funding overdue coupons; that although the issue of bonds was in excess of the amount per mile contemplated by the trust deed, all said obligations were debts of that company, and as such were on that date assumed by this defendant; that the said trust deed was then a lien on the property in the hands of this defendant and on the railroads and tramways easterly and westerly from Sandy; that when this defendant acquired, as it did on or about 16th May, 1889, possession of the property of the constituent companies all the constructed lines were narrow gauge, in poor condition for operation, the track made with light rails and the operated lines consisting of about three hundred and seventy-three (373) miles; that it was necessary for the successful operation and to the interchange of traffic with connecting railroads that the railroads constructed and to be constructed under the franchises of the company should be made broad or standard gauge and that a large expense should be incurred in widening and improving the road bed, taking out curves, improving the alignment and in putting on a standard gauge track of heavy steel rails; that this defendant being without means to pay the assumed indebtedness of the constituent companies, or to make the required improvements otherwise than by secured bonds, provided for and issued a series of first trust mortgage bonds payable to bearer, not to exceed in all sixteen million dollars ($16,000,000), dated July 1, 1889, the principal due in fifty (50) years with semi-annual interest at four (4)

per cent. per annum, the bonds or their proceeds to be used as follows: bonds to the amount of six million nine hundred thousand — ($6,900,000) or their proceeds, to exchange for or pay off the six million nine hundred thousand dollars
87 ($6,900,000) in bonds outstanding of the Denver & Rio Grande Western Railway Company and the interest and funded certificates therefor; an amount necessary, not exceeding seven million seven hundred thousand — ($7,700,000) of bonds, or their proceeds, to broad gauge the constructed lines of railroad, better and improve the same, purchase rolling stock, and make extensions to the constructed lines; and one million four hundred thousand dollars ($1,400,000) of said bonds to be kept as a capital reserve for new lines and other purposes; that to secure the payment of said bonds or so many *that to secure the payment of said bonds or so many* as should be negotiated, and the interest thereon, this defendant, on or about July 1st, 1889, made its trust deed bearing date on that day to the Central Trust Company of New York, as trustee, conveying all its lines of railroad constructed or owned, being about three hundred and seventy-three (373) miles of constructed railroad, and its franchises to construct other lines of railroad, and all railroads thereafter constructed with said bonds or their proceeds and included therein and conveyed all the lines of railroad and railroad tramway easterly and westerly from Sandy aforesaid, and theretofore purchased and owned by the Denver and Rio Grande Western Railway Company as aforesaid; that this defendant negotiated and sold bonds to purchasers in good faith and soon after the date thereof with said bonds or the proceeds thereof paid off, cancelled and retired the six million nine hundred thousand dollars ($6,900,000) in bonds theretofore issued by the Denver and Rio Grande Western Railway Company, and also paid off all the indebtedness of said last named company, the whole amounting to over eighteen thousand five hundred dollars ($18,500) per mile, in respect to said railroads and tramways easterly and westerly from Sandy, as well as in respect to other railroads of that company; that this defendant also expended of said bonds and the proceeds in broad gauging, improving and equipping the lines of railroad it acquired on its organization, at the rate of about twenty
88 thousand dollars ($20,000) per mile, of said bonds, and expended therefrom large sums in improving the said lines of railroad and tramway running easterly and westerly from Sandy; and that for the purposes specified in said bonds and trust deed, this defendant, prior to April 1, 1899, had negotiated and sold bonds of said series and secured by said trust deed, to the amount of fifteen million two hundred thousand dollars ($15,200,000), which are still outstanding, and that bonds of said series to the amount of eight hundred thousand dollars ($800,000) were cancelled, upon the issue of another series of bonds as hereinafter stated.

And this defendant claims and avers that upon its organization it became and has since continued to be a purchaser in good faith of the said lines of railroad and railroad tramways running westerly

from Sandy to and up Bingham cañon a distance of twenty (20) miles, and from Sandy easterly to and up Little Cottonwood cañon to Alta aforesaid, a distance of sixteen (16) miles, more or less, and without any notice or knowledge of the alleged or any frauds, irregularities or defects in the sales or as inducements to or in any way connected with or related to the sales under the deeds, or either of them, of the old Wasatch Company and Bingham Cañon & Camp Floyd Railway Company.

And this defendant shows that on the first day of April, 1899, it required further means to extend, improve and equip its lines of railroad, and to acquire connecting railroads and their stock and bonds, and to extend and further its business; that its limit of bonds of the series last aforesaid had been reached within eight hundred thousand dollars ($800,000) which was insufficient in amount for its purposes; and that thereupon it authorized and made a new series of bonds payable to bearer called first consolidated mortgage bonds, registered and coupon, the coupon bonds to be for one thousand dollars ($1,000) each and the registered bond for one thousand dollars ($1,000) or some multiple of one thousand dollars ($1,000), all bearing date April 1st, 1899, the principal payable at the end of fifty (50) years and interest at the rate of four per cent. per annum, payable semi-annually after date, and said series of bonds to be used and issued as follows: Sixteen mil-
89 lion dollars ($16,000,000) to be reserved to retire the bonds secured by said trust deed to the Central Trust Company as aforesaid, and the remainder to be issued at a rate of not exceeding twenty thousand dollars ($20,000) per mile for railroads not included in the trust deed to the Central Trust Company above mentioned, which this defendant had acquired or should thereafter acquire or of which it should acquire the capital stock and securities; also not to exceed in all ten million dollars ($10,000,000) for improvements and other uses of this defendant, and one million dollars ($1,000,000) for equipment and other purposes; and also five hundred thousand dollars ($500,000) per annum, but not to exceed nine million dollars ($9,000,000) in all for rolling stock, improvements and other beneficial purposes; that to secure the said bonds issued or to be issued this defendant by its first consolidated trust mortgage deed, dated April 1, 1899, conveyed to the State Trust Company (now by change of name called the Morton Trust Company), of New York city, all its railroad lines owned, acquired and to be acquired, and all its interest in the capital stock and bonds of associated and connecting railroads, with all appurtenances and property, real or personal, used or connected therewith; that said trust deed thereby became a second lien on all the property conveyed to the Central Trust Company as aforesaid, and a first lien on all the remaining franchises and property of the company acquired or to be acquired; that prior to June 30th, 1900, this defendant had issued to various persons and parties, purchasers in good faith, about two million five hundred thousand dollars ($2,500,000) in par value of said bonds and has since issued other bonds of said series to an amount of one

million five hundred thousand dollars ($1,500,000) additional, making in all four million dollars ($4,000,000) in par value of said bonds now issued and outstanding; and that the said railroads and railroad tramways running easterly and westerly from Sandy aforesaid are subject to both the mortgage deeds of this defendant above stated. And on information and belief this defendant avers that neither of the said trustees nor any purchase or holder of said
90 bonds had any notice or knowledge of any of the alleged, or of any defects or irregularities in the sales, or of any frauds affecting or inducing or of any matter or thing whatever unfavorably affecting the validity of the sales of the said railroads by the trustees of the old Wabash Company and the Bingham Cañon & Camp Floyd Railway Company.

And this defendant answering as to the alleged frauds, fraudulent inducements, defects and irregularities in the sales by Young and Scofield and Davis as trustees, of the railroads running easterly and westerly from Sandy, on its information and belief denies each of and all the charges set out in the bill of complaint, and denies that the complainant first discovered in July, 1898, or at any time discovered that this defendant or its predecessor in title acquired the possession of or any lien or interest in said property or any part thereof, through the fraudulent proceedings described in the bill of complaint or any fraudulent proceedings, or that the alleged fraud was or ever has been kept concealed from the Union Trust Company as trustee or from any holders of bonds under the alleged trust deed to said trust company, or that any fact connected with said sales or either of them, was concealed from, or unknown until July, 1898, to, the complainant, The Union Trust Company or any bondholder under said trust deed or either of them; or, if said sales or either of them or any fact connected with said sales or either of them were so unknown, the defendant avers upon information and belief that it was so unknown through the negligence of the complainant, The Union Trust Company, or the bondholders under said trust deed (to whichsoever of them it was unknown), and not by any concealment of this defendant or the Denver and Rio Grande Western Railway Company, its predecessor in title. This defendant denies that the books of account and financial statements of said railroads, or either of them, were at any time taken possession of by officers and agents or any officer or agent of this defendant or any predecessor of it in title, or have been kept concealed or are now concealed by any officer or agent of this defendant or in any
91 way concealed to its knowledge. This defendant alleges that as to the contents of said books of account or financial statements or what they show, this defendant is ignorant, and has no knowledge, information or belief concerning the same.

And this defendant further answering as to the charges of fraud in the bill of complaint in respect to the said sales by Young and Davis and Scofield as trustees, on its information and belief denies that there was no default in the payment of the interest coupons upon which defaults the principal of the bonds was declared to be

due; or that the net earnings of the said respective railroads were more than sufficient to have paid the said coupons either at the time when the respective defaults were declared, or on the days of sale; or that the Denver and Rio Grande Western Railway Company or its attorneys, officers, or agents or any of them at or before the times of sales or at any time knew or had any reason to know, that there were sufficient net earnings to pay said coupons; or that said last named railway company, for the purpose of depriving any holder of any bonds under the trust deed to the Union Trust Company of their security, or to enable it to acquire possession of the property and railroads, or for any purpose or in any way, by its officers, agents or attorneys or in anywise or by any means or agency, entered into the alleged or any fraudulent scheme with the trustee Charles W. Scofield, or any scheme in or by which it was understood or agreed, or in anywise contemplated, that the said defaults or any defaults should be declared to exist, when no default existed, for six months or any other period on certain or any interest coupons secured by said trust deeds, or that the principal of said bonds should be declared to be due by reason of alleged defaults, or that it was understood that the substitution of said Young, as trustee, by said Scofield should be pretended to be made, or that said Young was or was to be a clerk of said Scofield, or that no substitution of said Young as trustee was legally made; or that it was understood or agreed that said Young by reason of the alleged pretended defaults, or for any reason should declare the principal of the bonds, or any bonds described in the trust deed to Kountze and
92 Hall to be due; or that it was further understood or agreed that said Young as pretending trustee should advertise and sell the railroad of the old Wasatch Company under the power in its trust deed, or that the said Davis, trustee, with said Scofield, left the performance of the trustee's duties to Scofield, or that it was understood or agreed that said Scofield, in behalf of himself and said Davis (the trustees of the trust deed of the Bingham Cañon & Camp Floyd Railway Company) or otherwise, was to declare the principal of the bonds secured by said trust deed to be due, because of alleged defaults in the payment of certain interest coupons; or that thereupon said Scofield and Davis were to advertise and sell the railroad properties covered by said trust deed by virtue of the power therein; or that the said foreclosure sales made by said Young, and Davis and Scofield, or either of said sales, took place in accordance with the alleged or any fraudulent or any other scheme; or that the said Scofield in consideration of engineering said alleged or any fraudulent scheme or otherwise was to be allowed one-third of the profits or any profits of the purchase by the Denver and Rio Grande Western Railway Company; or that neither said Scofield nor Davis was present or acted at the sale made by them; or that the attorneys and agents, or any attorney or agent of the Denver and Rio Grande Western Railway Company conducted the proceedings of the sale or acted as auctioneers, or bid off the property; or that the said Charles F. Woerishoffer was then or ever had been a

director of the Denver and Rio Grande Western Railway Company, or then or at any time acted for or in its behalf, or directed the trustees' deed to be made to it otherwise than at the request and for the Rio Grande Western Construction Company as hereinbefore stated; or that the deed to said railway company was prepared by its attorneys, or made by the trustees without the payment of the bid; or that said trustees had no power to delegate their authority to offer the property for sale; or that no express authority was given by said trustees to any person to make said sale; or that said sale, bidding and conveyance were made or that either was made
93 in accordance with the fraudulent scheme set out in the bill of complaint, or in pursuance of any fraudulent scheme, or any scheme other than the honest and proper performance of duty by the trustees pursuant to the terms of their trust, and a proper and honest bidding and purchase at such sale and a proper and honest conveyance in pursuance thereof; or that such sale, bidding or conveyance was made for the purpose alleged in the bill of complaint, or for any fraudulent purpose or otherwise than as admitted by this defendant.

And this defendant, on information and belief denies that at the time of the sale of the Bingham Cañon & Camp Floyd Railway Company's railroad, under its trust deed it was worth one million dollars ($1,000,000), or that it was worth more than the sum bid, or that three hundred thousand dollars ($300,000) was an inadequate price, or that it was paying a net sum of over six (6) per cent. or any net per cent. per annum of interest on that amount; or that the old Wasatch Company's railroad at the time of the sale by Young was worth eight hundred thousand dollars ($800,000), or paying a net sum equal to six (6) per cent. or any net per cent. per annum on that sum, or that said railroad was worth over fifty thousand dollars ($50,000), or that the sum bid was an inadequate price, or that it was not paid; or that said Young or any attorney, officer or agent of the Denver and Rio Grande Western Railway Company learned that certain or any bondholders of the old Wasatch Company, or any person or party would bid at the sale on the day advertised or on any day, at least the sum of three hundred and fifty-five thousand dollars ($355,000), or about the amount of its bonded indebtedness, or any amount more than fifty thousand dollars ($50,000), or that thereupon the said Young at the request of the officers of the Denver and Rio Grande Western Railway Company, or to prevent competition of bidders, or higher bid than fifty thousand dollars ($50,000), adjourned the sale; or that upon said adjournment or at any time the officers or attorneys, or any officer or officers or attorney or attorneys of said railway company agreed with certain or any bondholders or bondholder as alleged in the bill of complaint, or made
94 any agreement, upon the consideration alleged in the said bill of complaint or otherwise, to prevent competition of bidders at said sale; or that the alleged bondholders or any bondholder accepted the alleged or any offer of the Denver and Rio Grande Western Railway Company, or agreed not to bid at the sale, or for

any of the reasons alleged, consented to the sale as made by said Young; or that any bondholder did not receive his *pro rata* of the bid until several years after the sale, or until threats of a suit for an accounting against Young. And this defendant on information and belief denies that the Denver and Rio Grande Western Railway Company knew when it received its deeds of conveyance for said properties that they had been or were being purchased at inadequate prices, or that the price for either railroad was inadequate; or that it knew that the Bingham Cañon and Camp Floyd railroad was worth one million dollars ($1,000,000), or earning six (6) per cent. net annual interest on that sum, or that it knew it was worth more than the bid; or that said railway company knew the old Wasatch Company's railroad was worth eight hundred thousand dollars ($800,000) or any sum more than the bid, or was earning six (6) per cent. per annum on eight hundred thousand dollars ($800,000), or anything net over operating expenses.

This defendant on its information and belief admits that at the time of the sale of the old Wasatch Company's railroad by Young, as trustee, about one-third of the bonds outstanding (the whole amount being three hundred and forty-five thousand dollars ($345,000) and not three hundred and fifty-five thousand dollars (355,000), were held by persons other than the bidder, but denies that they were men of large means or intended bidders; and this defendant on information and belief avers that all holders presented their bonds and received their *pro rata* of the proceeds of sale from the trustee, with knowledge or means of knowledge of all the proceedings prior to the sale. This defendant has no knowledge as to whether the said Young adjourned the sale as alleged, without advertising the adjournment, but alleges on information and
95 belief that if in fact said sale was so adjourned, ample authority was given therefor in the deed of trust under which he sold.

And this defendant answering on information and belief shows that after the making of the trust deed of the old Wasatch Company and prior to the sale, William A. Hall, one of the trustees of the deed, died, leaving Augustus Kountze, the other trustee, surviving, who in accordance with the powers of the deed duly appointed George M. Young a co-trustee; that afterwards and before the sale or proceedings for the sale, the said Agustus Kountze resigned his trust and trust powers, and the resignation was duly accepted by the old Wasatch Company, all in accordance with the provisions of said trust deed; that no trustee was appointed in his place and a vacancy of co-trustee with said Young existed and thereafter continued; that thereupon and by the provisions of said trust deed the said George M. Young became the sole trustee and vested with all the estate, powers and authority of the original trustees of the deed, and made the sale in pursuance of the powers of said deed; that said deed conveyed the mortgaged property and gave power of sale to the original trustees jointly and to the survivor, and their successors, and provided that the word "trustees" wherever therein used

should mean the trustees or trustee for the time being, whether original or new, and whenever a vacancy should exist to mean the surviving or continuing trustee, and that such trustee should during such vacancy be competent to exercise all the powers granted or conferred upon the trustees named in the deed of trust; that the said sales made by the said Young and Scofield and Davis as the respective trustees as this defendant is informed and believes, were fairly made and honestly conducted; that defaults in payment of interest and for the non-payment of which the sales were made, existed and had continued and were declared, and the principal declared due, in accordance with the provisions of the trust deeds under which the sales were made, and the sales made in accordance with the powers of the deeds and for the causes upon which sales were thereby authorized.

And this defendant further answering in respect to the
96 values of said properties at the time of said trustees' sales, alleges upon information and belief that the old Wasatch Company's line from Sandy to Alta was narrow gauge, and for about eight miles from Sandy to Wasatch was adapted to steam power; that it was cheaply constructed, mainly on Government land, and the track consisted of iron rails of not over thirty (30) pounds weight per yard, and its rolling stock of little value; that the tramway from Wasatch to Alta, of about eight (8) miles, was on Government land, poorly constructed, not adapted to steam power, but intended to be operated hauling up cars with horses or mules and letting them down by gravity, the track made of iron rails of the weight of about sixteen (16) pounds per yard, and its only equipment was cars of little value; that the value of the road consisted wholly in the successful operation of mines in Little Cottonwood cañon and vicinity and in getting ores for transportation to the Jordan valley, on which it was obliged to make rates sufficiently low to avoid competition by wagon hauling; that when said railroad was contemplated, and until a year or two after its construction to Alta, there was a large quantity of mineral ore produced near Alta, but prior to the sale the mines in and near Alta had practically failed to yield ores, and the larger part of the business of the road ceased; that at the time of and before the sale the road had become practically worthless, unless for the speculative chance that the business of mining in and around Alta should revive; that since the sale the shipment of ores from Alta has been very small and the tramway has been abandoned and is used as a wagon road, and that the operation of the road from Sandy to Wasatch has practically ceased for want of business to support it, or pay operating expenses; that at the time of the sale of the whole road was not worth fifty thousand dollars ($50,000) and has never since paid operating expenses and maintenance; that the railroad westerly from Sandy for about sixteen and thirteen one hundredths (16 13/100) miles was adapted to steam power, was narrow gauge, the right of way partly on Government and partly on
97 settled lands, the right of way over the latter inadequate and partly unpaid for, the roadbed narrow and cheaply con-

structed and the track of iron of not over thirty (30) pounds weight per yard, and the rolling stock insufficient and of poor quality, and as it existed at the time of sale said sixteen and thirteen one hundredths (16 13/100) were not worth, and could have been replaced for, $175,000; that the tramway in extension of the steam power road was on Government land, laid with iron rails of the weight of about sixteen (16) pounds per yard, and intended for use and used for hauling cars up with horses or mules and letting them down by gravity, and the cars of little value, the whole value of the tramway being less than ten thousand dollars ($10,000); that at the time of sale the road was not of any considerable value unless mines in the West Mountain mining district should be developed and yield ores for transportation by the road; that the sum of three hundred thousand dollars ($300,000) bid for the road was in excess of its real value and of the amount for which it could be replaced, and the bid for so large a sum was only justified by the expectation of continued and increased production of ores for shipment to the Jordan valley by said road; that as to the steam power part, since the said sale the track has been twice replaced by the use of heavier rails, once with steel rails of forty-five (45) pounds per yard and once with steel rails of sixty-five (65) pounds per yard, the gauge widened, the road bed improved, rolling stock supplied, rights of way acquired and paid for, and large sums expended thereon by said defendant and the Denver and Rio Grande Western Railway Company, its predecessor in title, and by reason thereof and of the increase of mining business in said district, and of its operation in connection with other railroads owned by this defendant and its said predecessor in title, the steam road has been made fairly profitable for several years; and that the tramway, with branches made at the expense of this defendant and mine owners, during most of the time since
98 said sale has been let to lessees without any rental other than the agreement that the lessees should haul all ores offered for transportation, to the steam road at not exceeding a freight rate named, and which was necessary to meet competition by wagon haul to the Jordan valley, and branches of said tramway have been extended to mines in said district.

And this defendant admits that, upon its organization part of the officers and persons who controlled the Denver & Rio Grande Western Railway Company became interested in and some of them became officers of this company, but denies they were all the same persons, and upon information and belief denies that the persons who became officers of this company knew or that any of them knew of the alleged or any fraudulent scheme connected with the sales of said railroads by said trustees, or either sale, or knew that there was sufficient or any money from net earnings of the alleged consolidated Wasatch & Jordan Valley Railway Company and its constituent companies or any or either of them, to pay the interest on the mortgages foreclosed; or knew that the defaults were or that either was alleged for the purpose of declaring principal due or in order to enable the trustees or either trustee to sell the mortgaged

premises in the manner alleged in the bill of complaint or in any way.

And this defendant alleges upon information and belief that at the time the Denver & Rio Grande Western Railway Company acquired possession of said railroads that company and all of its directors and officers believed and had reason to believe that the sales thereof and the conveyances thereof to that company were regular, honest and strictly proper in every respect. And this defendant alleges that when it acquired possession it and all of its directors and officers did so believe and have reason to believe.

And this defendant denies that the amount of the tolls, rents and income and the rental value of said railroads taken possession of or used by the Denver & Rio Grande Western Railway Company and this defendant exceeds the amount of principal and interest of the bonds secured by the mortgages thereon; but on the contrary
99 this defendant alleges upon its information and belief that there has been no net income of any kind from the railroad from Sandy to Alta, and that by reason of the improvements made on, and the connected operation of said railroad from Sandy for sixteen (16) miles westerly, and especially by the increase of mining in the West Mountain mining district, some net income has been derived therefrom, to an amount this defendant cannot precisely state, but which has not been as much as the interest accrued upon the said three hundred thousand dollars ($300,000) of the said bonds secured by first mortgage thereon as aforesaid.

And this defendant alleges, that for more than eighteen (18) years last past, it and the Denver and Rio Grande Western Railway Company, its predecessor in title and possession, and under claim and color of title, exclusive of any other right, have been in the exclusive, open, continuous, peaceable and adverse possession as owners of all the lines of railroad and tramways described in the complaint, one line running from Sandy westerly to and into Bingham cañon, a distance of twenty (20) miles, and one running from Sandy aforesaid easterly to and up Little Cottonwood cañon to Alta, a distance of sixteen (16) miles more or less, with all the side tracks, spurs, and property, real and personal, appurtenant thereto and have paid all taxes and assessments thereon; and that neither the alleged consolidated Wasatch & Jordan Valley Railway Company, nor any person or party claiming through or under it, nor any person or party through or under which it claims, has been seized or possessed of said railroads or any part thereof within seven (7) years, or within eighteen (18) years before the commencement of this action.

And on information and belief this defendant avers, that all the acts preceding, attending, and following the sales of the said railroads and tramways were open and largely matters of record, and if in fact there were any of the alleged frauds, irregularities or defects therein the same were known to or by reasonable diligence and inquiry ascertainable at the time or soon after the sales, by the alleged consolidated Wasatch & Jordan Valley Railway Com-
100 pany, the Union Trust Company, and the holders (if any), of

the bonds alleged to have been secured by the trust deed to the Union Trust Company as trustees; that the sales were openly made, the deeds reciting the sales and consideration were soon thereafter recorded, the grantee went into and held open possession, the alleged consolidated Wasatch & Jordan Valley Railway Company ceased to exercise any corporate franchises or to carry on any business, or hold meetings and wholly ceased to act as a corporation, or to pay any interest on its alleged bonds; and that if any act or fact connected with said sales has remained unknown until 1898, or until any time within the last eighteen (18) years and more, it has been through the laches and gross neglect of said alleged consolidated company, the Union Trust Company as trustee and the holders of bonds under the alleged deed to the last named company.

And this defendant alleges and insists that the cause of action, and each and every cause of action, alleged or pretended in the bill of complaint was at the time of the filing of the said bill and at the time of the commencement of this suit, completely barred by the statutes of the State of Utah with respect to the limitation of time for the bringing of actions.

And this defendant further answering on its information and belief denies that the Wasatch & Jordan Valley Railway Company alleged to have been incorporated by consolidation and which for distinction is herein referred to as the "new Wasatch Company," is or ever has been a corporation organized under the laws of the Territory of Utah, or is now a citizen of the State of Utah. This defendant, however, admits, that on the 8th of May, 1879, there was filed in the office of the auditor of public accounts of the Territory of Utah, an instrument bearing date April 29th, 1879, purporting to be articles of incorporation by the name Wasatch & Jordan Valley Railroad Company of a corporation formed by the consolidation of the said Bingham Cañon & Camp Floyd Railway Company and the Wasatch & Jordan Valley Railroad Company herein referred to as the "old Wasatch Company," and that said instrument recites that said constituent companies had consolidated with the written
101 consent of all the stockholders of the constituent companies, and purports to be articles of said consolidated company, and is signed in the name of each constituent company by C. W. Scofield as the president of each, with a seal purporting to be a seal of each affixed, and purporting to be attested by the secretary of each company respectively; but this defendant, on information and belief denies that all the stockholders of each constituent company had consented in writing to the alleged consolidation or that any meeting of the stockholders of either constituent company had been held to consider or act on the alleged consolidation; or that the boards of directors of said constituent companies, or the said companies ever agreed upon the terms of consolidation, or that due or any notice was given by advertisement of the consolidation or of the proposed consolidation.

And on information and belief this defendant states, that some years prior to the supposed consolidation of said constituent com-

panies, the said Charles W. Scofield had acquired the controlling interest in the capital stock of each, and the control of the sale and disposition of their bonds, and for some years had managed and controlled the companies and disposed of their securities at will, and though each company kept a board of directors and other officers; that such boards and officers were merely agents of and acted in all the business of the companies under the plans and directions of said Scofield, who, then and at the time of the alleged consolidation, was the president of both constituent companies, and had himself appointed president of the supposed consolidated "new Wasatch Company" immediately upon the making of its articles; and that the supposed articles of incorporation of the new Wasatch Company were made and filed on and according to his own plan and direction by himself as president of both companies, and not in pursuance of any agreement of the directors of the constituent companies or by consent of all their stockholders, and that, thereafter, no change in the former business of the constituent companies was made, or any new franchises exercised.

102 And this defendant admits the formal execution and recording of a trust deed purporting to be made by the "new Wasatch Company" as shown by Exhibit "A" annexed to the bill of complaint, but on information and belief this defendant denies that immediately after the recording of said trust deed there were issued or sold or have been outstanding, except as herein stated, eight hundred and eighty-four (884) bonds or any of said bonds, or that complainant owns five hundred and seventy-nine (579) bonds or any bonds issued or sold by said company. That as to whether payment of interest coupons on five hundred and seventy-nine (579) bonds or any bonds has been demanded, this defendant is ignorant and has no knowledge, information or belief concerning the same; but defendant admits and alleges that no interest has ever been paid by said company on any of the said bonds.

This defendant has no knowledge, information or belief as to whether the alleged demand or any demand on the trustee to declare the principal of said bonds immediately due and payable and to bring suit was ever made or that whether the trustee declined to act, or whether the complainant has elected to declare or has declared the principal of five hundred and seventy-nine (579) bonds due and payable.

This defendant on its information and belief denies that there is due on said five hundred and seventy-nine (579) bonds, the principal sum of five hundred and seventy-nine thousand dollars ($579,000) or any amount, or for interest $825,976.83 or any amount, or a total of $1,404,976.83 or any amount, payable by sale of said railroad properties, or in any way payable; and denies that the possession or interest of this defendant, of and in said properties is or ever was subject to any lien under the alleged trust deed of May 1, 1879. On information and belief this defendant admits that the Union Trust Company of New York accepted the supposed trusteeship under the said alleged trust deed and certified

as trustee eight hundred and eighty-four (884) of the bonds purporting to be secured by said deed. But this defendant states and shows upon its information and belief that said deed
103 if authorized at all, was authorized by the persons who were directors of said new Wasatch Company, and not by such directors and that the said trust deed was made and signed before the alleged articles of incorporation were filed, though the deed was not acknowledged until after such filing; that the provisions of said deed are such that it afforded no security or protection to purchasers and was adopted for use for fraudulent and speculative purposes; that its description of the mortgaged line is vague and gives no mileage of the whole or what part had been constructed; that, although it is called a first mortgage, it did not and does not disclose that all the constructed railroad was already mortgaged for much more than its value; that, although it provides for mileage limit of twenty thousand dollars ($20,000) per mile of constructed road, it does not show prior construction or mortgages, or provide any way to ascertain or enforce the limit, or that the trust company should do otherwise than certify the bonds belonging to the series to be sold, hypothecated or otherwise disposed of by the officers and agents of the company upon the most favorable terms attainable; that the said Charles W. Scofield hastened to get the bonds prepared and signed; and that the said Union Trust Company inadvertently certified eight hundred and eighty-four (884) bonds and delivered them to the said Scofield before its attention was called to the character of the security; and that, as soon as its attention was so called, as it was, it then refused to certify more; that neither the supposed company nor any of its officers or agents in its behalf ever negotiated, sold, hypothecated or otherwise disposed of any of said bonds; that no proceeds thereof have ever been received by it or applied to its use to pay its debts, or otherwise used for its benefit; that said eight hundred and eighty-four (884) bonds remained in the possession of said Scofield until after the sales and transfers of all the property of said company, under the prior mortgages, and possession thereof taken by or under the purchasers, and until after the alleged new Wasatch Company had ceased to do any business
104 or exercise any corporate franchises; that if said eight hundred and eighty-four (884) bonds or any of them have been transferred or in anywise disposed of or put upon the market, they have been pledged, sold or transferred by the said Charles W. Scofield to and for his own use, and in fraud of said company, and since said company ceased to do any business or own or use any property; and that if the complainant holds five hundred and fifty-nine (559) of said bonds or if any other party holds any of the eight hundred and eighty-four (884) bonds, he is not a purchaser in good faith or for value, but purchased or took the same at a trivial price, if any price at all, and with knowledge that the same had not been put out by the obligor company, that it had no property and was not exercising any franchises, that no interest had ever been paid, and that the negotiation of said bonds was fraudulent.

And this defendant shows and claims that all the interest coupons of said bonds maturing more than six years prior to the commencement of this action are barred by the statutes of limitations of Utah and New York.

And this defendant shows upon its information and belief that upon its organization about May 16, 1889, the Denver and Rio Grande Western Railway Company and its franchise to be a corporation, ceased, and this defendant succeeded to all its franchises, powers, and all its property and property rights; and that the defendant the alleged new Wasatch & Jordan Valley Railroad Company for over nine years last past has wholly ceased to use its franchise, if it had one, or any franchise, to be a corporation, or any franchise or authority to act as a railroad company under the laws of Utah and that by said laws, any franchise it may have had was forfeited long before the commencement of this action.

And this defendant denies all unlawful combination, confederacy and fraud charged in the bill of complaint; without this that any other matter or thing in the bill of complaint, material or necessary for this defendant to answer, and not herein answered, confessed, traversed or denied, is true to the knowledge or belief of this defendant; all of which this defendant is ready to maintain and prove as the court shall direct; and this defendant prays to be hence dismissed with its reasonable costs and charges.

105

THE RIO GRANDE WESTERN RAILWAY COMPANY,

[SEAL.] By WALTER HINCHMAN, *Third Vice-President.*

Attest: GEO. A. KRAUSE, *Secretary.*

BENNETT, HOWAT, SUTHERLAND & VAN COTT, *Solicitors.*
ROBT HARKNESS, *Of Counsel.*

STATE OF NEW YORK,
Southern District of New York, County of New York, } *ss.:*

The answer of the defendant, The Rio Grande Western Railway Company, was taken this 19th day of April, 1901, before me under the common seal of the said corporation, as by its said seal affixed appears.

(S'd) WM. MASON SMITH,
[SEAL.] *Notary Public, N. Y. Co.*

STATE OF NEW YORK,
Southern District of New York, County of New York, } *ss.:*

Walter Hinchman, being duly sworn, deposes and says: I am the third vice-president of The Rio Grande Western Railway Company, one of the defendants in this suit. The foregoing answer is true of my own knowledge except as to the matters therein stated to be

alleged upon information and belief, and as to those matters I believe it to be true. As to all matters not therein stated upon my knowledge, the sources of my information and the grounds of my belief are records and documents in the pos-ession of the said
106 defendant, of which I am the third vice-president, and general information received by me in the course of my duties as such officer.

(S'd) WALTER HINCHMAN.

Sworn to before me this 19th day of April, 1901.

WM. MASON SMITH,
[SEAL.] *Notary Public, N. Y. Co.*

107 EXHIBIT A.

Agreement between the Denver and Rio Grande Western Railway Company and the Rio Grande Western Construction Company.

This agreement, made and entered into this first day of August, in the year one thousand eight hundred and eighty one between the Denver and Rio Grande Western Railway Company, a corporation created and existing under and by virtue of the laws of the Territory of Utah, and hereinafter named as the railway company, or the said railway company, as party of the first part, and the Rio Grande Western Construction Company, which is a corporation created under and by virtue of the laws of the State of Colorado, duly and legally authorized to transact business in the Territory of Utah aforesaid, and hereafter called the construction company, or said construction company, as party of the second part, witnesseth, as follows:

That whereas, the said party of the first part was created and is existing as a corporation as aforesaid by the consolidation of the other railway corporations of the said Territory of Utah, to wit: the Denver and Rio Grande Western Railway Company, the Sevier Valley Railway Company, and the Salt Lake and Park City Railway Company, which consolidation took place and was perfected on the twenty first day of July, 1881, by reason whereof the said party of the first part succeeded to all the property, estate, franchises and rights of the said consolidated corporations, and assumes all the contracts and liabilities thereof;

And whereas, prior to the date of such consolidation, the said construction company had performed work and labor and furnished material for the purpose of constructing the railways of the said consolidating companies, or of some of them;

And whereas, the party of the first part contemplates the construction of the system of railways over the routes defined in its articles of association and incorporation, and the party of the first part by said consolidation having acquired the title to all the
108 property, rights of way, work, labor and materials of the said consolidating corporations, and became chargeable with the

liabilities of said consolidating corporations towards said construction company incurred in said work of construction;

And whereas, it contemplates the continuation of the said work of construction, and the construction and completion of the system of railways described in its articles of association, and the said construction company is willing to undertake the construction and completion thereof as contemplated by this contract;

Now therefore, it is mutually covenanted and agreed between the said parties, for themselves, their successors and assigns, respectively, as follows, to wit:

ARTICLE I.

The said railway company hereby agrees with the said construction company that it has received from the said consolidating corporations hereinbefore named, all the right, title and interest of each of the said consolidating corporations in and to all their contracts with the said construction company, and in and to all the real estate, right of way, work, labor, implements, tools, utensils, materials, books, maps, papers and surveys of the said consolidating corporations, and that it does hereby assume and agree to pay to the said construction company, in manner and form as hereinafter specified, the compensation hereafter provided for all work, labor and services of the said construction company, and materials furnished by it, and for right of way heretofore by it acquired on behalf of the said consolidating companies, or of the party of the first part, the prices hereinafter stated, which prices it is hereby mutually agreed shall be in full settlement for all such prior work, labor and services, property, materials, books, papers, maps and right of way, and that all prior contracts between the said construction company and the said consolidating corporations shall be and hereby are merged in this contract, and are covered by and included within the terms and conditions thereof.

109 ARTICLE II.

And the said construction company covenants and agrees with the said railway company, that it has heretofore proceeded with the construction of certain lines of railway in the Territory of Utah, for and on behalf of the said consolidating corporations, or of one or more of them, and that it has contracted for and procured large quantities of materials, work, labor, property, right of way and real estate, for and on behalf of said companies, and it hereby recognizes and agrees that all the rights and title, and interest of the said consolidated corporations, in and to the same and each and every part thereof, is vested in the said party of the first part, and that the said construction company shall and will diligently proceed with the construction and equipment of the said railways aforesaid, of the said party of the first part, and the telegraph lines appurtenant thereto, and required and necessary for the use, operation, conduct and maintenance of the said lines of railway, and it shall and will

complete the same in accordance with the terms and conditions of this agreement as soon as practicable, together with such extensions and branches, and connecting lines, as may from time to time hereafter be mutually agreed upon between said railway company and said construction company, all and singular said railway and telegraph lines, extensions, branches, and connecting lines to be constructed in divisions or sections, and in such order as to priority as shall be directed by said railway company from time to time, and as the population and business of the country and financial considerations shall warrant.

ARTICLE III.

And the said construction company covenants and agrees to build the said railway and telegraph lines upon such route and routes as shall be selected and indicated by the said railway company; to make the road bed of proper width for a gauge of three feet, put down the track with proper cross-ties and rails for said gauge, with all necessary and proper sidings and turnouts, to complete and equip the same under the direction of the said railway company and its officers, and in so doing to conform in all essential respects, to the profiles, maps, drawings, specifications and requirements of the said railway company, both as to quality of material and mode of construction, it being mutually understood and agreed that the general style and finish of the work, and quality of materials, and mode of construction, and extent and fitness of equipment, shall not be inferior to those of the Denver and Pueblo division of the Denver and Rio Grande railway, in the State of Colorado, when it was turned over to the company by the contractors; and it being also further mutually understood and agreed that the entire work shall be done by the said construction company, as above indicated, in a good and sufficient workmanlike manner, to the satisfaction and acceptance *to* the board of directors of the said party of the first part, and that the said work shall include the grading, construction of road beds, the furnishing and laying of all rails with the joints, spikes, sleepers and timbers necessary therefor; the building of all bridges, viaducts, and tunnels—if any—along the route selected, and to a connection with railroads in any adjoining State or Territory, as the same shall be determined by the said railway company; the building and furnishing of all depots and engine houses, station houses, ware and storehouses, water tanks, shops and all other buildings necessary or requisite for properly conducting the business of each division when it shall be turned over to the railway company, and the furnishing of all engines, passenger and freight cars, machinery, tools, shafting, telegraph poles and wire, pumps, machinery and engines adequate for working the same, and for the conduct of the business of the said railway and telegraph line, or any section or division thereof, when and as the same shall be turned over to the said railway company.

111 It being likewise mutually understood and agreed that the locomotive engines, passenger and freight cars and other rolling stock, may be delivered subject to the compliance on the part of the said railway company with any contract or contracts for the furnishing, purchase, or procurement thereof, which may be made by the construction company with the approval and consent of the said railway company, and as shall be hereafter mutually agreed upon between the parties hereto; and that the agreement in this article contained respecting telegraph lines, poles, wire and equipment, shall only extend to so much thereof as shall not be furnished or constructed by a telegraph company, without further cost to the railway company, by agreement between them for joint construction and use thereof.

ARTICLE IV.

And the said construction company further covenants and agrees to obtain all rights of way, depot grounds, and real estate necessary for the construction, use, operation and maintenance of said railway and telegraph lines, at the time possession thereof shall be transferred and delivered to the said railway company as aforesaid, and to pay all costs, liabilities, disbursements and expenses which have been heretofore, and shall be hereafter, up to the time of taking actual possession and control of the work of construction, expended on account of the construction of any portion or portions of the lines of the said consolidating railway companies, or of the line or lines of the said party of the first part, or in the acquisition of right of way, depot grounds, or other real estate, or the protection thereof from all encroachments thereon by other parties, persons or corporations, pending said work of construction, and all legal expenses connected therewith, all engineering expenses, both in the field and in the office, incurred in respect of such construction or connected therewith; also all interest which has or shall become due, on any bonds or other obligations of the said railway company on
112 account of any part or portion or section or division of said railway or telegraph lines, before possession and control thereof shall be transferred and delivered to the said railway company.

ARTICLE V.

And the said railway company, in consideration of the covenants and agreements of the said construction company, does hereby covenant, stipulate and agree to pay to the said construction company for all the work, equipment, material, construction, right of way, real estate, property and otherwise, hereinbefore named, as follows, to wit:

First. In its first mortgage, six per cent. thirty year gold bonds, sixteen thousand ($16,000) dollars per mile for each and every mile of said railway and telegraph lines agreed to be constructed and transferred, as aforesaid.

Second. In its full paid capital stock, at the rate of sixteen thousand ($16,000) — per mile for each and every mile of the railway and telegraph lines agreed to be constructed and transferred, as aforesaid; and it is hereby further mutually agreed that the said railway company shall have the option and right at its election, to substitute in place of an equal amount of the said capital stock at its par value, the amount of cash which it has received or may receive, and not otherwise expended, from said consolidating companies on subscriptions to their capital stock, dollar for dollar.

Third. All such municipal, county, State or United States bonds, or other securities, as the said railway company shall receive, in aid of the construction of said railway, subject to compliance with all the conditions upon which said bonds are issued to said railway company.

Fourth. Such lands or real estate, if any, as shall be ac-
113 quired by said railway, in aid of the construction of its said line or lines of railway by grant, subsidy, purchase or otherwise, and not required by the said railway company for purposes connected with operating or maintaining its road, subject, however, to compliance by said construction company with all the conditions upon which said lands may be so acquired.

Fifth. All other subscriptions or subsidies, if any, which shall be received by the said railway company, to aid in the construction of its lines of railway and appurtenant telegraph as aforesaid, subject to compliance by said construction company with all the conditions upon which such subscriptions or subsidies shall be made.

Article VI.

The said railway company further covenants and agrees to deliver the said bonds and stock to the said construction company for the purposes of negotiations or sale, when, and as the negotiations of the said construction company for money to rapidly prosecute the construction of the said railway and telegraph lines, shall make it desirable or necessary, when, and as its officers may, in their discretion, altho' in advance of construction, call for the same, provided said railway company shall not be required to deliver its bonds more rapidly than permitted by the terms of the trust deed in securing the same.

Article VII.

It is further mutually stipulated and agreed that the construction of said railway and telegraph lines be proceeded with in divisions or sections of such extent, to be respectively commenced and completed at such times as may be hereafter mutually agreed upon between said parties, and that the work of construction may be commenced at as many different points along said line as may be hereafter mutually agreed upon, and be proceeded with simulta-
neously from said points in any direction along the routes
114 selected and determined upon, in order to secure vigorous

prosecution and early completion of the entire work, and that when either of said parties shall desire it, supplementary contracts shall be made and executed from time to time by and between them as to any particular division or divisions of the said railroad before or at the time of commencing work thereon, which shall name definitely, and explicitly specify the terms and methods of construction and equipment, and as to the times and lengths of sections in which the same shall be completed and delivered over to the said railway company, but such supplementary contracts shall, in no regard, conflict with the general provisions of the contract.

That in making such supplementary contracts the said parties shall take into consideration and be governed by the requirements of the country for railroad facilities for doing its business, the remunerative character thereof, and that the proportion of the above named bonds and stock, effects and property to be appropriated to the construction and equipment of each division, shall be as nearly equal in proportion to the cost of the whole work under this agreement, as can be ascertained by estimates made after the surveys, maps, profiles, specifications, etc., shall be completed, taking into consideration the comparative costs and difficulties of construction of all the divisions of the said railway to be made as aforesaid, and also taking into consideration the financial conditions and circumstances at the time being, all of which shall be determined and agreed upon between the said parties hereto, after detailed surveys of such division or divisions, or section or sections, have been made, and the maps, profiles, and specifications have been prepared; and such supplementary contracts shall in no wise conflict or be inconsistent with the provisions of any trust deed, given or to be given to secure payment of the bonds aforesaid, with the interest thereon.

And it is hereby further mutually agreed that the said construction company may cause any counstructed line of railway or any partially constructed line of railway, existing upon or along any or either of the routes aforesaid, to be transferred and conveyed to said railway company, and shall become entitled to compensation therefor, the same as if it had constructed the same, provided it shall put the same in condition, as contemplated by this contract, and cause the same to be conveyed free and clear of all incumbrances.

ARTICLE VIII.

And it is hereby mutually covenanted and agreed between said parties, that whenever any section of not less than twenty miles of any division of the said railway shall be completed and equipped by the said construction company under this contract, that the said railway company shall have the right to require that such completed section or sections shall be turned over to the said railway company upon its written demand, and thereupon, upon such demand, the said construction company shall transfer and deliver title and absolute possession and control thereof to the said railway company,

until the whole line of railway and telegraph shall be finished and so delivered and upon delivery to said railway company of each section or division of the said completed road and telegraph said railway company shall execute and deliver to the said construction company an instrument in writing evidencing its acceptance of such section or division, as constructed and equipped according to the contract; or if any work thereon or equipment thereof shall remain uncompleted under this contract, then such writing shall particularly specify what remains so uncompleted, in order to a full and perfect compliance with the terms of this contract; and as to such incomplete specifications the said construction company shall complete and construct the same diligently according to the provisions hereof; and until the said railway company shall receive and accept such sections or divisions as hereinbefore provided, the said construction company may, if it so elects, retain possession of and operate the same until the said railway company shall require the delivery thereof to it in manner and form aforesaid.

116 Agreement annexed to answer of R. G. W. Ry. Co.

And it is further mutually covenanted and agreed, that after such section or division of the said line of railway, shall be delivered to and accepted by the said railway company, and be by it used and operated, that it shall transport over the same promptly, and to the exclusion of all other business, if necessary to secure promptness, all material, laborers, employees, and other things required by the said construction company in the construction and equipment of said railway and telegraph, or in the construction and equipment of other lines of railway and telegraph by its being constructed for and on account of the said railway company and that for all such transportation the said construction company shall pay to the said railway company the actual cost thereof, as nearly as can be ascertained; or in case any section or division of said lines of railroad and telegraph shall remain in the possession of and be operated by the said construction company as above provided after it shall be completed, then, and during the period of such possession and operation, the said construction company shall have the right to transport over the same promptly, and to the exclusion of all other business, if necessary to secure promptness, all laborers and employees, material and other things required by said construction company in the construction and equipment of the said railway and telegraph lines, or in the construction and equipment of other lines of railway and telegraph by it being constructed for or on account of the said railway company; and that for all such transportation the construction company shall credit on and allow in the accounts to be kept by it, as hereinafter provided, the actual cost thereof as nearly as can be ascertained; and the said construction company shall keep an accurate and detailed account of all receipts and expenditures connected with the operation by it of such section or division, giving credit or making allowance on such account as aforesaid, and shall render to the said railway company a statement thereof monthly; and in case there shall be a surplus of earnings

and receipts over and above the cost of operating and ex-
117 penditures aforesaid, then the same shall be paid over to the said railway company to be applied to its purpose; and in case any deficiency arises from any such use and operation said railway company shall reimburse the same to the said construction company.

ARTICLE IX.

The said construction company hereby further covenants and agrees that it shall and will, at all times, so long as it shall have possession of any portion, section or division of said line of railway and telegraph and up to the time when the same shall be delivered over to the said railway company and accepted by it as hereinbefore provided, well and truly pay off and discharge or cause to be paid off and discharged, each and every tax, assessment or other liability and governmental charge, if any, which may from time to time be lawfully levied or imposed by competent authority upon the said property so retained by it or in its possession, or upon any part thereof, the lien whereof might or could be held to attach to the said property, subsequent to the delivery thereof to the said railway company; and that it shall not in any manner, create, suffer, or permit any lien or incumbrance to attach to or be and remain upon said railway and telegraph lines or any part thereof, or any property real or personal, or mixed, to be furnished or delivered by it therewith, except respecting rolling stock, as aforesaid, either for the purchase price thereof or for laborers' wages, or materials furnished or moneys borrowed, or any cause whatsoever; and that said railway lines, and each section and division thereof which it may construct under this or any supplementary contract, for or on account of the said railway company, shall, at the time of the possession thereof be delivered to said company and accepted by it, be absolutely free and clear from all and every lien, charge or incumbrance made, suffered or permitted by the said construction company; and that it will, upon the demand of the said railway company, furnish and deliver to the said railway company satisfactory evidence that the same are free and clear from all liens and incumbrances
118 aforesaid, and that there are no outstanding claims or liabilities against said construction company incurred on account of laborers' wages or material furnished, or otherwise, by reason whereof any subsequent lien or incumbrance could be perfected against that part or portion of the railway delivered over as aforesaid to the said railway company; and that against all and every such claim or liability, lien or incumbrance, the said construction company hereby covenants and agrees to save harmless the said railway company, its successors and assigns forever.

ARTICLE X.

And it is further mutually covenanted and agreed by and between said parties, that if in the course of construction and equipment of any division or divisions of the said railway and telegraph lines,

the work thereof shall not be progressing so as to have it completed within the time specified by this contract, or by any supplemental contract which may be entered into between said parties in respect thereto, that the said railway company may, by written notice, require the said construction company to increase the force and hasten the procuring of materials and equipment and the building of structures on such division or divisions sufficient to insure the completion thereof within the time specified in the contract relating thereto; and if within thirty days after the receipt of such notice, the said construction company shall not increase the working force and hasten the supply of materials and equipments, and the building of necessary structures, so that there is reasonable certainty that the whole will be completed within the time specified by such contract, and ready for the delivery to the said railway company, then and in such case the railway company may, in its discretion, employ such additional force and procure such requisite material, equipment and construction of necessary buildings and structures on such division or divisions, and cause the said work of construction to proceed with diligence, and charge all expenses and
119 disbursements by it incurred in that behalf against the said construction company, which shall allow and pay the same to the said railway company.

But the said railway company shall have the right, at its election and in its discretion, after the expiration of the said thirty days after service of said notice, in case the said construction company shall not increase the working force and hasten the supply of materials and equipments, and the building of necessary structures as required by it by said notice, to terminate this contract and all supplemental contracts relating to the said lines of railway, and take possession of all the work of construction that which has theretofore been done by said construction company, and have and hold the same, and may sublet the same to other contractors, or may proceed by itself with the said work of construction, and hold the said construction company liable in damages for any loss which may result to it from its failure to perform its part of the contract, or any such supplemental contract or contracts.

Article XI.

And it is further covenanted and agreed by and between said parties, that this contract, or any supplemental contract or contracts, may terminate at any time by their mutual consent in writing, or in case such mutual consent cannot be had and obtained, then the said railway company shall have the right, upon giving sixty days' notice in writing of its intention so to do, to terminate this contract and any such supplemental contract or contracts as may be made thereunder with reference to the said lines of railway, and that thereupon and on the expiration of the said sixty days, and at the time specified in the said notice of termination, this contract or such supplementary contracts, shall thereupon cease and determine; and the said construction company does agree that upon such ter-

mination it will peaceably surrender and deliver over to the said railway company all work done by it upon or along all the
120 routes aforesaid, together with all structures, buildings, fixtures, erections and otherwise pertaining to the performance on its behalf of the terms and provisions of this contract; and the said parties shall thereupon settle and adjust all their accounts under this or any such supplemental contract, and the said construction company shall transfer and deliver over to the said railway company thereupon, all and singular all materials, property, tools, utensils and implements, surveys, books, maps and papers which it has acquired and shall have in its possession with reference to the performance of this contract, upon a price to be then and there mutually agreed upon between said parties; and the said railway company shall thereupon settle and adjust all the just claims of the said construction company against it by reason of the performance of work and labor, and furnishing materials and otherwise, as under and according to the terms and provisions of this contract or any such supplemental contract or contracts.

ARTICLE XII.

And it is further mutually covenanted and agreed by and between the said parties, that in case any disagreement or difficulty shall arise between them as to the proper construction of any of the provisions of this contract, or as to the proper compliance therewith by either party, or as to any other matter or thing resulting therefrom, or as to any such supplementary contract or contracts pertaining to any or either of the said routes or lines of railway, the same shall be submitted for arbitration to three arbiters, one of whom shall be selected by the said railway company, one by the said construction company, and the third shall be selected by those two, and the matter in difference shall be submitted to the three so selected, with such books, papers, writings and other things as they may require, or as either of the said parties may elect to submit in its behalf, and after due consideration such arbiters shall make their award in writing, and the award of a majority of them de-
121–688 livered in duplicate to the parties hereto, shall be final, as to the subject of such disagreement, and be binding upon, and be observed and performed by each of the said companies.

In witness whereof, the said parties have caused their corporate seals to be hereto affixed, and the same to be attested by their respective presidents and secretaries, on the day and in the year first aforesaid, by authority of their respective boards of directors.

DENVER & RIO GRANDE WESTERN RY. CO.,

[SEAL.] By W. J. PALMER, *President.*

RIO GRANDE WESTERN CONS. CO.,

By WALTER HINCHMAN, *Pres't.*

689 In the Circuit Court of the United States for the District of Utah.

NATHANIEL W. RAPHAEL, Complainant,
against
WASATCH AND JORDAN VALLEY RAILROAD COMPANY ET AL., Defendants.

Affidavit of George Foster Peabody, Verified April 12th, 1901, in Reply to Additional Affidavit of Complainant, Verified April 9th, 1901.

SOUTHERN DISTRICT OF NEW YORK, *County of New York*, } ss:

George Foster Peabody, being duly sworn, says: I have read a copy of the additional affidavit verified by the complainant, Nathaniel W. Raphael, on 9th April, 1901.

The printed cuttings from newspapers appended to his affidavit are correct. One stipulation of the agreement for the sale of common stock of the Rio Grande Western Railway Company made by my banking firm of Spencer Trask & Company is that my said firm shall guarantee the purchaser against any claim of the complainant in this suit. The statement in that respect contained in the circular letter of my firm to the holders of the common stock of that company, of which one of such cuttings is a copy, is as follows:

"Since the commencement of the negotiation one Raphael has instituted in the United States circuit court for Utah a suit against the title of the Western Company to the Bingham and Alta spurs of its railroad; and in making the contract for the vendors our firm gave its personal guarantee against any liability of the company in
690 that suit. Although the company's solicitors are confident of success, it is proper that our guarantee be ratably shared by all who avail themselves of the contract made by us for the vendors. From the $80 per share and interest mentioned above we shall, therefore, deduct such amount per share as counsel shall advise us will amply protect us upon such guarantee. Such amount will be held in a special trust."

The result of this provision is that if the complainant have any just claim, its payment is secured not only by the great excess of the assets of the Rio Grande Western Company itself over its debts, *but also by a special amount to be held in trust.* I am advised by the counsel of the Western Company that such provision is a fact against, and not in favor of, the complainant's motion, as it gives a greater assurance that, if the complainant's claim shall be established, it will be paid.

The statement of the said Raphael in his affidavit that the retention of a fund to indemnify my said firm for their proposed guaranty against complainant's claim, is an attempt on the part of the Western Company to hinder and delay the complainant, is unqualifiedly

false. The Western Company is in no way a party to the agreement or provision for such indemnity or such guaranty. The Western Company, if the purchase of its common stock shall be completed, will be itself indemnified against my claim of complainant.

I do not know, and I am perfectly confident and charge that the complainant does not know, and cannot truthfully state, what the policy of the Denver & Rio Grande Railroad Company with regard to its charges on long hauls and short hauls will be, if it shall acquire the majority of the common stock of the Western Company. The Bingham and Wasatch (or Alta) spurs of the railroad of the Western Company have been treated ever since 1882 as an integral part of the railroad of the Western Company. It is that fact and the ownership of the Bingham spur by the Western Company which has justified the Western Company in making its large investment for standard gauging, laying with heavy rails and otherwise improving that spur. The statement as to the stifling of competition by the Rio Grande Western Railway Company in the shipment of
691 coal is without foundation. The Western Company does not now own or control, nor has it owned or controlled, coal mines. There are, upon the main line of the Western Company large coal mines which ship great quantities of coal northwardly to Salt Lake City and Ogden, and, naturally and properly enough, to such purchasers of coal as there may be on the Bingham and Wasatch spurs.

As I am informed and believe, the statement of the complainant that the earnings of the Bingham and Alta branches were greater per mile of road than the earnings of the Rio Grande Western, while the Bingham and Alta spurs were operated separately, is untrue. So is the statement untrue that the Bingham and Alta branches feed the main line, but not *vice versa*. It is true that the Bingham and Alta branches feed the main line. It is also true that the main line feeds the Bingham and Alta branches. It is untrue that, as the Bingham and Alta branches are now operated, they are not having a fair chance to carry on their own business and on principles which would work out for their own best good. On the contrary, it is for the best good of the several branches that they should be, as they have been for many years, such integral part of the Western railroad. The statement that under the present management of the Western Company the Bingham branch gets merely mileage is untrue. That branch is not separately run.

The assertion that the complainant has no means of knowing about freight rates unless a receiver be appointed, is untrue. The entire record of the Bingham and Alta spurs will be carefully preserved during the pendency of this action. I am informed and believe that it is no ground for the appointment of a receiver that a receivership would aid the complainant to obtain evidence. At any rate, he does not need such aid to obtain such evidence.

The complainant's assertion or implication as to what the branches could earn if independently managed is unfounded. It is true as he says, that, if they were independently managed, a demand for mile-

age securing additional income could be made. It is equally
692 true that such demand could and probably would be rejected. It is obvious that, if the Bingham and Alta spurs were independently managed and were to demand more than their proper share of rates, their managers would simply compel the Western Company, if it were independent, to construct, as it easily could, other branches in their stead.

The complainant says in his affidavit that he obtained the ownership of the bonds upon which he sues "in the year 1898, the greater part, and in 1899." In his bill of complaint, which was verified by him under oath, he stated that he first obtained the knowledge of what he characterized as the fraudulent proceedings in the matter of the foreclosure sale of the Bingham and Wasatch spurs in August, 1898. In view of the statement of his last affidavit, I believe and charge that all of the information which, in his bill of complaint he said he acquired in August, 1898, he acquired prior to the acquisition of such interest, if any, as he has in the bonds upon which he sues. In his last affidavit, the complainant says that at the time he obtained the ownership of such bonds, there were attached to a part of them "*several years* of defaulted interest coupons." As I am informed and believe, there were attached to all, or the greater part of such bonds, not only coupons for "several years" but coupons for the entire period from and after 1st July, 1880. A portion of the information upon that subject upon which I speak, is the complainant's own statement in his bill of complaint to the effect that the interest accrued on 1st January, 1901, upon the 579 bonds upon which he sues, was the sum of eight hundred and twenty-five thousand nine hundred and seventy-six and 83/100 dollars ($825,976.83), being interest at seven (7) per cent., the rate of interest on the bonds, for twenty (20) years, four (4) months and seven and one-half (7½) days.

GEORGE FOSTER PEABODY.

Sworn to before me this 12th day of April, 1901.

[SEAL.] WM. MASON SMITH,
Notary Public, N. Y. Co.

693 EXHIBIT E.

In the U. S. Circuit Court for the Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant,
vs.
SPENCER TRASK ET AL., Defendants. } In Equity.

In the Circuit Court of the United States for the District of Utah.

NATHANIEL W. RAPHAEL, Complainant, *against* WASATCH & JORDAN VALLEY RAILROAD COMpany, The Rio Grande Wreste-n Railway Company, Union Trust Company of New York, Trustee; The Central Trust Company, Trustee; The Morton Trust Company, Trustee, Defendants.	In Equity. 394.

Supplemental Affidavits on Motion for Receiver and Amendment to Bill of Complaint.

Charles L. Easton, of New York city.
Pierce, Critchlow, & Barrette, of Salt Lake City, solicitors for complainant.

U. S. circuit court, filed Apr. 30 1901.
JOHN A. SHIELDS, *Clerk.*

694 In the Circuit Court of the United States for the District of Utah.

NATHANIEL W. RAPHAEL, Complainant, *against* WASATCH & JORDAN VALLEY RAILROAD Company, The Rio Grande Western Railroad Company, and Union Trust Company of New York, as Trustee, Defendants.	In Equity. No. 394.

UNITED STATES OF AMERICA, *Southern District of New York, County of New York,* } *ss:*

Nathaniel W. Raphael, being first duly sworn, deposes and says: That this day he made inquiry of the secretary of the New York stock exchange, and that he was informed that on the 13th day of March, 1901, the Rio Grande Western Railroad Company listed $4,000,000 additional of its first consolidated collateral mortgage 4 per cent. 50 year gold bonds, secured by a mortgage executed by said railroad company and dated April 1, 1899.

695 Deponent is unable to say whether the $4,000,000 is in addition to the $19,000,000 set forth in deponent's former affidavit herein or not, but deponent believes that it is additional to the amount of $19,000,000 as stated in said former affidavit.

Deponent further says that the 44 miles of road and equipment covered by the trust deed of May 1, 1879, which was given to secure

the $884,000 of bonds, including deponent's bonds, is inadequate security for the payment of said bonds and interest, and deponent believes that unless the rents and income of said mortgaged premises are taken possession of by a receiver, to be appointed pending this action, that, that fund during the pendency of this action will be diverted by the defendant, The Rio Grande Western Railroad Company, and applied to its own uses, and complainant's bonds will thereby be deprived of such additional security as is called for by said trust deed to the payment of complainant's bonds.

NATHANIEL W. RAPHAEL.

Subscribed to and sworn to before me this 19th day of March, 1901.

HENRY FLUEGLMAN,
Notary Public, N. Y. Co.

696 In the Circuit Court of the United States for the District of Utah.

NATHANIEL W. RAPHAEL, Complainant,
against
WASATCH & JORDAN VALLEY RAILROAD COMPANY, THE RIO GRANDE WESTERN RAILROAD COMPANY and UNION TRUST COMPANY of New York, as Trustee, *et al.*, Defendants.

UNITED STATES OF AMERICA,
Southern District of New York, City and County of New York, } *ss:*

Nathaniel W. Raphael, being first duly sworn, deposes and says that the annexed advertisement appeared in the New York Herald on April 6, 1901, and made a part hereof, and deponent says that that portion of the advertisement of Spencer Trask & Co. which refers to the above entitled suit, wherein Spencer Trask & Co., propose to retain in their hands out of the proceeds of the sale of the shares of the capital stock of the defendant, The Rio Grande Western Railway Company, a sum of money to indemnify said Spencer Trask & Company in their proposed guarantee against complainant's claim to the Bingham and Alta branches, as deponent is informed and believes, to be an attempt on the part of the said The
697 Rio Grande Western Railway Company, to hinder and delay the complainant in the prosecution of said suit, and the recovery of the income which the said defendant, The Rio Grande Western Railway Company, is receiving from the operation of the said Bingham and Alta branches, and will receive unless a receiver is appointed as already asked for said branches, pending this suit.

Deponent further states as he is informed and believes, that the said consolidation scheme as set out in said advertisement if allowed to be accomplished without the court shall appoint a receiver of the said Bingham and Alta branches pending this suit, will greatly

lessen the income of the said Bingham and Alta branches, for the reason, as deponent is informed and believes, that the mileage of the defendant, The Rio Grande Western Railway Company, will be increased in proportion to the present mileage of the Denver & Rio Grande Railroad Company, and that in the shipment of ores from the Bingham mines over the Bingham branch, and from the Alta mines over the Alta branch, the new management will collect and charge a less amount on the long hauls than on the short hauls; in other words, the Bingham and Alta branches are feeders of freight to the main line of the defendant, The Rio Grande Western Railway Company, and that as deponent is informed and believes, the said The Rio Grande Western Railway Company does not contribute more freight as originating upon the main line and passing over the Bingham and Alta branches up to the mines than the Alta & Bingham branches furnish the said main line of the Rio Grande Western Railway Company.

Deponent is informed and believes that the mining timber and lumber that is now shipped over the Bingham & Alta branches originates entirely upon the Oregon Short Line Railroad Company,
698 which connects with said Bingham and Alta branches at Sandy station on the Oregon Short Line road, and that as deponent is informed and believes, the coal which is shipped over the Bingham and Alta branches comes from the coal mines either owned or controlled by the Rio Grande Western Railway Company, and that under the present management of the Rio Grande Western Railway Company, there is no encouragement to other coal miners to sell their coal to the purchaser of coal on the line of Bingham and Alta branches; in other words, the present management of the Rio Grande Western Railway Company in the coal shipments stifles competition in the shipment of coal over said branches from other coal mines on the line of the Oregon Short Line and its connecting roads.

Deponent is informed and believes and so states the fact to be that the earnings of the Bingham and Alta branches were greater per mile of road than the earnings of the Rio Grande Western while the Bingham and Alta branches were operated separately; and deponent is informed and believes that the Denver & Rio Grande Western, the predecessors of the defendant, The Rio Grande Western Railway Company did not take over the Bingham and Alta branches for the benefit of those branches but said branches were taken over for the benefit of the main line—to afford traffic for it as a feeder; in other words, the Bingham and Alta branches feed the main line not *vice versa* and it does not feed any other road although these branches are in direct connection at Sandy station with the Oregon Short Line. Deponent is informed and believes as he understands railroading the tariff and everything else connected with the railroads are adjusted with reference to the benefit to be derived by the whole system, not by the branch lines alone, so that as the branches are now operated, it cannot be said that they are having a fair chance to carry on their own business or principles

699 which would work out the best goods for said branches. For example, how much freight originating on the Oregon Shore Line points can these branches hope to carry as against similar, perhaps inferior commodities originating on the line of the Rio Grande Western? Deponent is informed and believes that the Bingham branch is shipping large quantities of ore from the Bingham mines billed directly over the Rio Grande Western railway to Denver, with the privilege of sampling those ores from the Bingham mines at either Bingham junction or Salt Lake City, and as deponent is informed and believes under the present management of the Rio Grande Western the Bingham branch gets merely its mileage as against 750 or 800 miles which is allotted to the main line. At all events, under the present management of the Rio Grande Western, complainant has no means of knowing unless there was a receiver appointed pending this litigation, to operate said branches, but what the same system would be continued to be employed in the adjustment of the freight rate, as now conducted. And it would only be common, every day railroading so to do, whereas, deponent is informed and believes if the branches were independent in their management a constructive mileage would be demanded and the present income of said branches would be much larger, and a flat rate as against the rates of either the Rio Grande Western or the Oregon Short Line and their connections would be obtained for said branches, and there would be competition between these last two named railroads for the business of said branches.

Deponent further says that he obtained the ownership of his said bonds mentioned in the bill of complaint in the year 1898 the greater part, and in 1899, and that there were attached and a part of said bonds, several years of defaulted interest coupons, but that when deponent purchased said bonds he purchased the same in
700–703 good faith; that he never had any knowledge before he purchased the same but what the said bonds were lawfully acquired and owned by the persons from whom he made said purchases, for which he paid valuable consideration. That he never had any knowledge before he bought said bonds, that said bonds had ever been used for any other purpose other than to provide money for the said defendant The Wasatch & Jordan Valley Railroad Company, and that he never had any knowledge before he purchased said bonds that said bonds had ever been used or hypothecated for the individual indebtedness of any of the officers of the said defendant, The Wasatch & Jordan Valley Railroad Company, and that deponent never had the slightest suspicion but what said bonds were rightly put into circulation at the time deponent purchased said bonds, and at the time that they were countersigned by the defendant, The Union Trust Company of New York City.

Deponent therefore states that he believes unless a receiver is appointed to take charge and operate said branches, that the said income of said branches will be greatly lessened and will be deprived from the application on the final hearing of this case to the payment of complainant's bond.

Further deponent saith not.

NATHANIEL W. RAPHAEL.

Subscribed and sworn to this 9th day of April, 1901.

[SEAL.] WILLIAM W. BARRY,
Notary Public, New York County.

704 In the Circuit Court of the United States for the District of Utah.

NATHANIEL W. RAPHAEL, Complainant,
vs.
WASATCH & JORDAN VALLEY RAILROAD COMPANY, THE RIO GRANDE WESTERN RAILROAD COMPANY, and UNION TRUST COMPANY OF NEW YORK, as Trustee, *et al.*, Defendants.

UNITED STATES OF AMERICA,
Southern District of New York,
City and County of New York, } *ss:*

Nathaniel W. Raphael, being duly sworn, deposes and says:

That he made a mistake in his bill of complaint (on page 6, printed bill), when he stated that he had discovered the "fraud" in the month of July, 1898, which should have been in the year 1899, in the month of July, and in his affidavit which he made on the 9th inst., he made a mistake in stating that he purchased the greater portion of his bonds in 1898, when it should have been in the year 1899.

Deponent says that he purchased in June, 1899, 407 of his said bonds, and shortly thereafter in 1899 he purchased the balance of the 579 bonds which he owns and which are described in the
705 bill of complaint. That just before he purchased the first lot of bonds, having been solicited to purchase them, he examined Poor's Railroad Manual for the year 1879, and he found the following report:

"Wasatch and Jordan Valley railroad."

Line of road: Bingham city, U. T., to Alta city, U. T. 44.20 miles. Sidings and other tracks, 13 miles. Gauge, 3 feet. Rail 30 lbs. Built up in 1872 from Sandy up Cottonwood cañon to Granite, and in 1876 to Alta. In 1878 the Bingham Cañon and Camp Floyd R. R. was merged, making the total length 44.20 miles.

Rolling stock: Locomotive engines, 7. Freight and ore cars, 300.

Operations for the three years 1876, 1877 and 1878. Gross receipts $734,021.80. Operating expenses $340,462.66. Net earnings $393,559.14. Average net earnings per annum, $131,186.38; interest on bonds, $61,880; undivided remainder $67,306.38.

Financial statement: Capital stock $1,100,000; and 7 per cent. gold bonds $884,000—total stock and bonds $1,984,000. Interest May and November, Union Trust Company, New York city, trustee.

Directors (elected May 6th, 1879) C. M. Schofield, New York city, N. Y.; B. H. Morgan, J. G. Kennedy, and G. M. Young, Salt Lake City, Utah T.; and Charles Lockhart, Pittsburg, Pa.

C. M. Schofield, president, New York city.

B. H. Morgan, vice-president, Salt Lake City, U. T.

Sec'y and treas. J. G. Kennedy, gen'l sup't G. M. Young.

Principal office and address 115 and 117 B'way, New York, N. Y."

That shortly after he made his purchase, he went in the month of June, to the Union Trust Company, the trustee in the trust deed of May 1st, 1879, in this city, and inquired whether the trust deed of May 1st, 1879, had been foreclosed, and what the trust
706 company knew about these bonds, and the bond clerk of the trust company furnished deponent with the following memorandum:

"Merged into the Rio Grande Western R'y Co. Principal offices, Salt Lake City. W. J. Palmer, pt., Colorado Springs, Col., Geo. Forbes Peabody, V. P., 29 Pine St., N. Y. Chas. W. Drake, sec. & tr., 11 Broadway."

Deponent called upon the secretary of the Rio Grande Western Railway Company at the office of the railway company, 11 Broadway, New York city, immediately after receiving the above memorandum and deponent asked the secretary of the railway company, whom he saw, at his said office, what he knew about complainant's bonds, deponent showed the secretary at that time one of his said bonds. The secretary of the railway company said to deponent that Mr. Theodore F. H. Meyer, who was the attorney of said railway company, and who had an office in the city of New York, could inform deponent in reference to the bonds. Deponent immediately called upon Mr. Meyer at his office in New York and finding him in his office he showed Mr. Meyer one of deponent's bonds and asked him what he knew about the bonds. Mr. Meyer replied that the bonds were second mortgage bonds and deponent answered that the bonds read "first mortgage" bonds. Deponent then showed Mr. Meyer the memorandum which the bond clerk of the Union Trust Company had furnished deponent as above described and Mr. Meyer read it and remarked that the memorandum was not correct in this particular that the railroad executing these bonds had not "merged" into the Rio Grande Western Railroad Company, but that the Rio Grande Western Railway Company had "purchased" the railroad. Deponent at that time did not know that the Rio Grande Western Railway Company had "purchased" the road at mortgage
707 foreclosure sale of the underlying bonds, nor was he told at that time by Mr. Meyer that the "purchase" was at a mortgage foreclosure sale of the underlying mortgages.

Shortly after this interview with Mr. Meyer, deponent learned that Charles W. Schofield, the president of the Wasatch & Jordan Valley Railroad Company, and who had signed the bonds in question, was living in the city of New York.

Deponent did not know Mr. Schofield, he had never seen him.

Deponent found Mr. Schofield after considerable search and inquired of him what he knew about deponent's bonds. Mr. Schofield replied that in 1880 he owned a controlling interest in that railroad and that in the spring of that year he had failed in business and had made an assignment under the insolvent laws of the State of New York, and that he had lost all of his interest in the road. Mr. Schofield was reluctant to furnish deponent any information in regard to the bonds, but he finally told deponent that the road had been sold at foreclosure sale of certain underlying bonds that were ahead of deponent's bonds, but that that sale did not cover several miles of extension of the Bingham branch. Not being able to obtain any further information at that time from Mr. Schofield deponent had another interview and perhaps two interviews within a short time after the first interview with Mr. Schofield, when Mr. Schofield told deponent that he had been employed by Charles F. Woerishoffer to purchase the underlying bonds on this road, and that Mr. Woerishoffer, as compensation for his, Schofield's, services in the matter agreed to give him, Schofield one half interest in the profits growing out of the purchase of the Bingham bonds. Mr. Schofield stated that before Woerishoffer made the purchase of the Bingham bond, he made a statement in writing to Mr. Woerishoffer of the earnings of the road and it was satisfactory, and that Mr. Woerishoffer then purchased the bonds. Mr. Schofield further said that
708 after Mr. Woerishoffer had purchased the bonds on the Bingham branch, and before Mr. Schofield made the foreclosure as one of the trustees, under the Bingham mortgage, Mr. Woerishoffer stated to Mr. Schofield that Gen. Palmer wished a third interest in the Bingham purchase, and therefore he wished Mr. Schofield to consent to take a third interest instead of a half interest and Mr. Schofield said that he consented to that arrangement. Mr. Schofield said that he never had received anything out of the matter as Mr. Woerishoffer died shortly after the property was foreclosed.

Deponent further says that after learning these facts from Mr. Schofield and from Poor's Manual he caused letters to be written to Salt Lake City, for a copy of the trust deed of May 1st, 1879, and also of the underlying mortgages and the deeds of the foreclosure sales, and after receiving these papers or a portion of them, deponent again called on Mr. Meyer, at his office in New York, but deponent was told by Mr. Friend, Meyer's partner, that Mr. Meyer was at his country place on Lake George, in this State. Deponent then said to Mr. Friend that he would like again to talk with Mr. Meyer to see if this bond matter could not be settled as he, deponent, had been informed there never had been any foreclosure of the trust deed of May 1st, 1879, and that from what knowledge he had obtained, deponent stated he believed there was an actual fraud perpetrated in the foreclosure of the underlying mortgages. Mr. Friend then said to deponent that he would write to Mr. Meyer and arrange for a meeting with Mr. Meyer at his country place; that shortly after this conversation with Mr. Friend, he was informed by Mr. Friend that deponent could see Mr. Meyer on a certain day at

a certain hotel on Lake George, and thereupon deponent sometime in the month of August, 1899, went to Lake George and saw Mr. Meyer and deponent then told Mr. Meyer what he, deponent,
709 had learned in regard to the unlawful proceedings attending the sale under the underlying bonds and deponent told Mr. Meyer that he wanted to avoid a lawsuit if possible, and that he had called to see if the matter could not be settled. Mr. Meyer said that he would write to Mr. W. J. Palmer, the president of the Rio Grande Western Railway Company, who was then in London, England, and when he, Meyer, should hear from Mr. Palmer he would let deponent know what could be done in the matter.

Deponent heard nothing further from Mr. Meyer until the early part of October, 1899, when deponent having called at the office of Mr. Meyer was told by Mr. Meyer that Mr. Palmer was in the city of New York, that he had just returned from England, and, Mr. Meyer said, that it was better in such matters that the principals should be got together, and suggested that deponent call on General Palmer. Deponent then told Mr. Meyer he did not personally know Mr. Palmer. Mr. Meyer then gave deponent a letter of introduction and deponent called upon Mr. Palmer at the office of the Rio Grande Western Railroad Company, 11 Broadway, and deponent then stated to Mr. Palmer that he would like to settle the matter and that Mr. Palmer after talking the matter over with deponent, said he would let deponent know in a few days what decision he would come to; and thereupon deponent received the following letter, from the secretary of the railroad company:

"The Rio Grande Western Railway Co.

Geo. A. Krause, secretary.

11 Broadway, New York, *October* 28, 1899.

W. Raphael, Esq., c/o Russell Sage, Esq., 31 Nassau St., city.

Dear Sir: General Palmer wishes me to write to advise
710 you that he has discussed the subject concerning which you called on him several days ago with his associates in the company, and he regrets to say that he cannot propose anything.

Yours truly, GEO. A. KRAUSE."

Deponent after receiving said letter caused communications to be sent to Salt Lake City and obtained copies of the articles of incorporations of all these railroads. Deponent also caused a search to be made for the books of the railroad company showing the receipts, expenses and earnings prior to the foreclosure of the underlying mortgages, and the result of deponent's investigation as to the whereabouts of the account books and records, and from the best information he could get they were delivered to the Denver & Rio Grande Western Railroad Company at the time of the foreclosure of the underlying mortgages by Mr. George M. Young, the last superintendent of the railroad.

Deponent then endeavored to find Mr. Young and not being able

to find him, deponent then caused investigation to be made as to the actual earnings of the Bingham and Alta branches, and from the information he obtained, he was satisfied that the underlying roads were earning more than sufficient to have paid the interest upon the mortgages at the time of the mortgage foreclosure sales.

Deponent thereupon under the advice of his counsel caused a demand to be made in New York city upon Mr. Schofield, as the last president of the railroad company, for the payment of the coupons on complainant's bonds maturing November 1st, 1899, and that having caused said demand to be made, deponent thereupon after six months had elapsed from the time of making said demand, deponent caused a written demand to be made upon the
711 Union Trust Company to declare a default of the principal of deponent's bonds, and to foreclose the trust deed of May 1st, 1879. Deponent's counsel and deponent called upon the officers of the Union Trust Company and tendered to the officers of the trust company complainant's bonds with an offer of indemnity as to the cost of foreclosure proceedings, and requested an early decision. The matter was under consideration by the trust company for a short time and complainant's counsel while it was under consideration by the officers of the trust company prepared and submitted to the trust company a draft of a bill of complaint foreclosing deponent's bonds and asking to redeem from the underlying mortgage foreclosure sales, and also asking for the appointment of a receiver to take possession of the road and collect the rents and income pending the proposed suit. Deponent was informed by his counsel and verily believes it to be true that the draft of that bill of complaint was furnished to the counsel for the trust company and after the same had been considered by the officers of the trust company and the counsel of the trust company, the trust company declined to bring the suit, because the property was such a great distance from New York and also by reason of the property being in possession of the Rio Grande Western Railroad Company, it was evident that the litigation would become prolonged. Thereupon deponent's counsel prepared the bill of complaint which was filed in this action, and that under his advice, learning that the Hon. Edwin M. Shepard, of this city, was counsel for the Rio Grande Western Railway Company as deponent was informed by deponent's counsel, he delivered to Mr. Shepard sometime in the month of July, 1900, a copy of that bill of complaint, and as deponent is informed and believes Mr. Shepard was asked if the matter could not be settled out of
712 court, and as deponent is informed and believes Mr. Shepard replied that he knew nothing about the matter except by hearsay, but that he would be obliged to send a copy of the bill to counsel in Salt Lake City, and to communicate with the officers of the railroad company in Utah, which would take some little time.

Deponent was advised by his counsel of what had been done and decided to wait until an answer had been received from Mr. Shepard, before filing the bill of complaint. Not receiving any answer sometime in the latter part of September, 1900, deponent's counsel called

upon Mr. Shepard and from that time until the filing the bill of complaint in this action there were numerous interviews between deponent's counsel and Mr. Shepard which resulted in not being able to settle the matter. Hence deponent caused the bill of complaint to be filed.

Deponent says that from the time he purchased the said bonds in June, 1899, down to the time of the filing of the bill of complaint, he was diligent in learning the facts in regard to this matter, and that his delay in a great measure was caused, first, by waiting for a decision from Gen. Palmer while he was in England, and from the delay caused in obtaining copies of the documents pertaining to the road that would enable counsel to prepare the bill of complaint, and from the necessary delay of six months from the time demand was made for the payment of the interest coupons before instituting the suit or requesting the trust company to bring the suit, and from the delay while the trust company was considering the matter, and from the time of the decision of the trust company not to bring the suit the delay was caused by the belief that the counsel for the Rio Grande Western Railway Company here in New York would settle the matter, and awaiting his decision after being furnished with a copy of the bill, complainant filed the bill at the earliest op-
713 portunity. Complainant never had any knowledge as to the fraud as told by Schofield or never had any knowledge that the underlying bonds had been foreclosed until he discovered the same from what Schofield had told him and upon inspection of the documents received from Utah.

Deponent says that before he purchased these bonds, he knew nothing of the condition of the Rio Grande Western Railway Company; he never had any knowledge as to what its capital stock was or what its bonded indebtedness was, and, that all the information which he has already given by previous affidavits concerning the Rio Grande Western Railway Company has been acquired by investigation within the last few months. That deponent never knew of the proceedings which resulted in the consolidation of the Denver & Rio Grande Western Railway Company and also the Rio Grande Western Railway Company until deponent's bill of complaint was prepared.

And further deponent saith not.

NATHANIEL W. RAPHAEL.

Subscribed and sworn to before me this 17th day of April, 1901.

HENRY BENOIT,

[SEAL.] *Notary Public, Kings County.*

Certificate filed in New York county.

714 In the Circuit Court of the United States in and for the District of Utah.

NATHANIEL W. RAPHAEL, Complainant, *vs.* WASATCH & JORDAN VALLEY RAILROAD COMPANY, The Rio Grande Western Railway Company, and Union Trust Company of New York, as Trustee, *et al.*, Defendants.	In Equity. 394.

Amended Bill of Complaint.

To the honorable judges of said court, in chancery sitting:

Nathaniel W. Raphael by leave of the court in that behalf first had, and obtained, brings this, his amendment of his bill of complaint against the Wasatch & Jordan Valley Railroad Company, the Rio Grande Western Railway Company, the Union Trust Company of New York, as trustee the Central Trust Company as trustee, and the Morton Trust Company as trustee.

And thereupon your orator complains and makes amendment of his said bill of complaint herein, as follows:

First. After the word "shows" in the third line, page 6,
715 folio 16 of complainant's printed bill, insert the words "complainant did not purchase his said bonds until as follows: In the month of June, 1899, he purchased 407 of his said bonds, and the balance of the 579 bonds he purchased later in the year 1899."

Second. After the word "that" in the third line, page 6, folio 16, of the printed bill of complaint, erase the word "he" and insert in place thereof "complainant;" and in the fourth line of page 6, folio 16 of the printed bill of complaint, erase the figures "1898" and substitute in place thereof the figures "1899;" and in the third line of page 6, folio 17, erase the figures "1898" and in substitution thereof insert the figures "1899."

Wherefore your orator prays, as he has before prayed in his original bill of complaint; and that said defendants may answer the said amended bill of complaint but not under oath, such oath being hereby waived, according to the practice of this court, all and singular the matters stated and charged in the said original bill of complaint and those hereinbefore stated or charged in this your orator's amended bill of complaint.

CHARLES L. EASTON AND
PIERCE, CRITCHLOW & BARRETE, *Solicitors.*

E. B. CRITCHLOW, *Of Counsel.*

716 At a stated term of the circuit court of the United States for the southern district of New York held at the United States Court building in the borough of Manhattan, in the said city on the 1st day of May, 1901.

Present: The Honorable Addison Brown, district judge.

NATHANIEL W. RAPHAEL, Complainant,
against
SPENCER TRASK, GEORGE FOSTER PEABODY, E. M. BULKLEY, Charles J. Peabody, and Acosta Nichols, Defendants.

The motion of the complainant for an injunction having come on to be heard upon the return of an order to show cause issued by the Hon. Addison Brown, judge, on the 30th day of April, 1901, with an order restraining the defendants from selling and delivering stock of the Rio Grande Western Railway Company, now after reading the bill of complaint and the papers therein referred to as "A," "B," "C," "D" and "E," being the bill of complaint, the answer of the Rio Grande Western Railway Company, moving papers and answering papers upon an application made by the complainant for a receiver in a certain suit pending in the circuit court of the United States for the district of Utah in which the complainant was complainant and The Rio Grande Western Railway Company and others were defendants, and after hearing Charles L. Easton, of
717 counsel for the complainant, and after reading the affidavit of the defendants Spencer Trask, George Foster Peabody, Edwin M. Bulkley, Charles J. Peabody and Acosta Nichols presented by Parsons, Shepard & Ogden, their solicitors appearing specially for those defendants for the purposes of this motion only, and after hearing H. B. Closson and Edward M. Shepard, of counsel for the defendants for the purposes of this motion only, it is

Ordered, that the said restraining order be and the same hereby is vacated; and it is further

Ordered, that the defendants be and they hereby are enjoined until the further order of this court from paying out or parting with the fund or moneys for indemnity, to them or special trust, which shall come to or be in their hands or under their control pursuant to their advertisement bearing date the 2nd day of April, 1901, and thereafter published, addressed "To the stockholders of the Rio Grande Western Railway Company" a copy of which is set forth in the complainant's moving papers; and it is further

Ordered, that the defendants shall be at liberty at any time to specially move upon the said papers now before the court upon the present motion, or any such papers or upon such other papers as they may deem proper, or upon the said papers now before the court or any of them and such other papers as they may deem proper, to vacate the order and direction hereinbefore made concerning such fund or moneys or special trust, and that such motion, if and when so made by the defendants, shall be heard and determined in all respects as if the complainant were moving
718 originally for such order and direction concerning such fund or moneys.

ADDISON BROWN.

(Endorsed:) U. S. circuit court, Filed May 2, 1901, John A. Shields, clerk.

719 (*Alias.*)

The President of the United States of America to Spencer Trask, George Foster Peabody, E. M. Bulkley, Charles J. Peabody, and Acosta Nichols, Greeting:

You are hereby commanded as you were before commanded, that you and each of you personally appear before the judges of the circuit court of the United States of America, for the southern district of New York, in the second circuit, in equity, on the first Monday of July, A. D. 1901, wherever the said court shall then be, to answer a bill of complaint exhibited against you in the said court by Nathaniel W. Raphael, and do further and receive what the said court shall have considered in that behalf. And this you are not to omit under the penalty on you and each of you of two hundred and fifty dollars.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the borough of Manhattan, in the city of New York, on the 10th day of June in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States of America, the one hundred and twenty-fifth.

JOHN A. SHIELDS, *Clerk.*

CHARLES L. EASTON,
Solicitor for Complainant.

The defendants are required to enter appearance in the above cause, in the clerk's office of this court, on or before the first Monday of July, 1901, or the bill will be taken *pro confesso* against them.

J. A. S., *Clerk.*

720 (Endorsed:) I hereby certify, that on the 10th day of June 1901, at the city of New York, in my district, I personally served the within alias subpœna in equity, upon the within named defendant, E. M. Bulkley, by exhibiting to him the within original, and at the same time leaving with him a copy thereof. I further certify, that at the same time and place, to wit: No. 27 Pine street, New York city, the place of business of said defendants, I served the within alias subpœna in equity upon the within named Spencer Trask, George Foster Peabody, Charles J. Peabody and Acosta Nichols by delivering to and leaving with E. M. Bulkley, their partner in business a copy thereof for each, he accepting service for each defendant as per directions of Charles L. Easton, solicitor for complainant. N. Y. June 11th, 1901. William Henkel, U. S. marshal, S. D. N. Y.—U. S. circuit court, Filed Jun- 11, 1901, John A. Shields, clerk.

721 In the Circuit Court of the United States for the Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant, *against* SPENCER TRASK, GEORGE FOSTER PEABODY, EDWIN M. BULKLEY, CHARLES J. PEABODY, and ACOSTA NICHOLS, Defendants.	In Equity.

The clerk will please enter our special appearance for the defendants Spencer Trask and George Foster Peabody, for the purpose solely of objecting that this suit cannot be maintained by the plaintiff in this district and that the court has no jurisdiction thereof.

Dated New York, July 1, 1901.

PARSONS, SHEPARD & OGDEN,
111 *Broadway, Borough of Manhattan,*
New York City, N. Y.

(Endorsed:) U. S. circuit court, southern district of New York.—Nathaniel W. Raphael, against Spencer Trask and others.—Præcipe for appearance of Spencer Trask and George F. Peabody.—Parsons, Shepard & Ogden, 111 Broadway, N. Y. city.—U. S. circuit court, Filed Jul- 1, 1901, John A. Shields, clerk.

722 In the Circuit Court of the United States for the Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant,
against
SPENCER TRASK, GEORGE FOSTER PEABODY, EDWIN M. BULKLEY, CHARLES J. PEABODY, and ACOSTA NICHOLS, Defendants. } In Equity.

The clerk will please enter our special appearance for the defendants Edwin M. Bulkley, Charles J. Peabody and Acosta Nichols, for the purpose solely of objecting to the jurisdiction of the court.

Dated July 1st, 1901.

PARSONS, SHEPARD & OGDEN,
111 *Broadway, Borough of Manhattan,*
New York City, N. Y.

(Endorsed:) U. S. circuit court, southern district of New York.—Nathaniel W. Raphael against Spencer Trask and others.—Præcipe for appearance of Edwin M. Bulkley, Charles J. Peabody and Acosta Nichols.—Parsons, Shepard & Ogden, 111 Broadway, N. Y. city.—U. S. circuit court, Filed Jul- 1, 1901, John A. Shields, clerk.

723 In the Circuit Court of the United States for the Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant,
against
SPENCER TRASK, GEORGE FOSTER PEABODY, EDWIN M. BULKLEY, CHARLES J. PEABODY, and ACOSTA NICHOLS, Defendants. } In Equity.

To the judges of the circuit court of the United States for the southern district of New York:

The joint and several plea of the defendants, Spencer Trask, George Foster Peabody, Edwin M. Bulkley, Charles J. Peabody, and Acosta Nichols, to the bill of complaint of Nathaniel W. Raphael, filed and exhibited against them in the circuit court of the United States for the southern district of New York.

The said defendants appearing specially under protest for the purpose of objecting by this plea to the jurisdiction of the court and for no other, by Parsons, Shepard & Ogden, their solicitors, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint to be true in manner and form as the same are therein set forth, for plea in bar, nevertheless, to the said bill do plead and aver, that the plaintiff is, and at the commencement of this suit was, a citizen of the State of New
724 Jersey, and that both the defendants Edwin M. Bulkley and Charles J. Peabody are, and at the commencement of this suit were, and for more than eight years prior to such commencement were, likewise citizens of the said State of New Jersey; that neither of the said defendants is or was at the commencement of this suit, or for upwards of eight years has been either a citizen or resident of the State of New York, or of any other State than the said State of New Jersey.

All of which matters and things these defendants do aver and plead in bar to the said bill, and humbly pray the judgment of this honorable court, whether they should make any other or further answer to the said bill hereby pleaded unto as aforesaid.

PARSONS, SHEPARD & OGDEN,
Solicitors for the Defendants, Spencer Trask, George Foster Peabody, Edwin M. Bulkley, Charles J. Peabody, and Acosta Nichols, Appearing Specially for the Purpose Only of Objecting by This Plea to the Jurisdiction of the Court,
111 *Broadway, N. Y. City.*

EDWARD M. SHEPARD, *Of Counsel.*

SOUTHERN DISTRICT OF NEW YORK, } ss:
County of New York, }

Edwin M. Bulkley, Charles J. Peabody and Acosta Nichols
725 being duly and severally sworn, do severally depose and say: I am one of the above named defendants. The foregoing plea is not introduced for delay and the same is true in point of fact.

EDWIN M. BULKLEY.
CHAS. J. PEABODY.
ACOSTA NICHOLS.

Sworn to and subscribed before me, this third day of July, 1901.
[SEAL.] WM. MASON SMITH,
Notary Public, N. Y. Co.

NORTHERN DISTRICT OF NEW YORK, *County of Saratoga,* } ss:

Spencer Trask and George Foster Peabody, being duly and severally sworn, do severally depose and say: I am one of the above named defendants. The foregoing plea is not introduced for delay and the same is true in point of fact.

SPENCER TRASK.
GEORGE FOSTER PEABODY.

Sworn to and subscribed before me, this 5 day of July, 1901.
[SEAL.] MARIE J. V. COSTIGAN,
Notary Public.

I hereby certify that in my opinion the foregoing plea is well founded in point of law.
(S'd) EDWARD M. SHEPARD,
Of Counsel for Defendants.

726 (Endorsed:) U. S. circuit court, southern district of New York.—Nathaniel W. Raphael, against Spencer Trask and others.—Plea of Spencer Trask, George Foster Peabody, Edwin M. Bulkley, Charles J. Peabody and Acosta Nichols.—Parsons, Shepard & Ogden, solicitors for said defendants, 111 Broadway, N. Y. city.—U. S. circuit court, Filed Jul- 8, 1901, John A. Shields, clerk.

727 United States Circuit Court, Southern District of New York.

NATHANIEL W. RAPHAEL
vs.
SPENCER TRASK, GEORGE FOSTER PEABODY, Edwin M. Bulkley, Charles J. Peabody, and Acosta Nichols. } August 28, 1902.

Charles Locke Easton, for complainant.
Parsons, Shepard & Ogden, Mr. Shepard and Mr. Smith, of counsel, for defendants.

THOMAS, *J.:*

The present question relates to the jurisdiction of the court. It appears from the bill that the complainant in 1901 filed a bill in the United States circuit court for the district of Utah against the Wasatch & Jordan Valley Railroad Company, the Rio Grande Western Railway Company, and the Union Trust Company of New York, as trustee, to foreclose a mortgage given by the first named company, and to redeem from two underlying mortgages certain spurs of railroad sold on foreclosure and thereafter continued in possession

under claim of title by Rio Grande Western Railway Company for nearly twenty years before the bill was filed, of which company an accounting is also demanded.

The defendants in the present action, composing the firm of Spencer Trask & Co., undertook to obtain certain of the stock of the Rio Grande Western Railway Company, and to sell the same to
728 the representatives of the Denver & Rio Grande railroad, which company proposed to acquire the "railroad of the Rio Grande Western Company by acquiring the common and preferred stock of that company." It is not understood from the bill that any sale or encumbrance of the railway, or its franchises, directly or indirectly, was intended. Spencer Trask & Co., as private individuals, so far as appears, acting for stockholders of the Rio Grande Western Railway Company, and not for that company, proposed to sell stock issued by such company to persons acting for the Denver & Rio Grande Railroad Company. After the undertaking was under way, Spencer Trask & Co. learned of the foreclosure of the second mortgages, and in their public advertisement soliciting stock made the following statement:

"Since the commencement of the negotiations, one Raphael has instituted in the United States circuit court of Utah a suit against the title of the Western Company to the Bingham and Alta spurs of its railroad; and in making the contract for the vendors our firm gave its personal guarantee against any liability of the company in that suit. Although the company's solicitors are confident of success, it is proper that our guarantee be ratably shared by all who avail themselves of the contract made by us for the vendors. From the $80. per share and interest mentioned above we shall, therefore, deduct such amount per share as counsel shall advise us will amply protect us upon such guarantee. Such amount will be held in a special trust."

729 The bill states:

"That the members of said firm of Spencer Trask & Company are not parties to the suit pending in Utah and that there is no agreement existing between complainant and the other holders of the outstanding bonds similar to complainant's bonds, and Spencer Trask & Co., by which the said proposed 'fund' shall be applied toward the satisfaction of complainant's bonds and the other outstanding bonds."

There are further allegations that the complainant:

"Is informed and believes that if said consolidation as set forth in the scheme contemplated by the advertisements referred to, is allowed to be carried out, without some stipulation between your orator and the members of the said firm of Spencer Trask & Co., as to the custody of the said fund, proposed to be created as aforesaid, the rights of remote purchasers of the mortgage premises, upon which complainant claims a lien, will have intervened pending complainant's suit in Utah, so that if complainant succeeds at the final hearing of his suit in Utah, it will require the bringing into the suit as

defendants, such remote purchasers, as the Denver & Rio Grande Western Railway Company and their proposed successors."

The prayer for relief is:

"That a preliminary injunction be issued restraining the said members of the firm of Spencer Trask & Company from
730 selling the said shares of the capital stock of the Rio Grande Western Railway Company to the Denver & Rio Grande Western Railway Company as set forth in the said advertisements of Spencer Trask & Company and which injunction your orator prays may be made perpetual upon the final hearing of this suit, unless the firm of Spencer Trask & Company shall agree to turn over to some trust company in the city of New York at and before the completing of said sale of said shares, a sum of money which may be determined by this court, out of the proceeds of said sale, as will be sufficient to satisfy complainant's claim and the other outstanding bondholders similar to his own, upon the final hearing of complainant's suit in Utah."

From the above it appears that the complainant seeking to foreclose a second mortgage covering a railroad in Utah, has filed a bill in New York against the members of the firm of Spencer Trask & Co. to prevent them from selling the stock of a company that for nearly twenty years has held the apparent title of such railroad derived from the sale thereof upon prior mortgages.

The first question is whether a suit to restrain private persons from selling the stock of a company is ancillary to a bill filed to foreclose the mortgages on the railway of such company. The defendants in the second suit are in no wise related to the cause of action in the first suit; they hold no property of the obligated corporations; they may not be asked to discharge the judgment,
731 or to render any account looking to its payment; they have made no agreement with the complainant, or that enures to him. They chanced to be dealers, on their own account or that of others, in nowise in privity to any party in the first suit, in the stock of a company whom the complainant hopes to show has no better title to the railway than that of earlier mortgagees in possession; and yet the complainant asks to restrain the transfer of such stock lest the mortgaged premises should not remain "in *statu quo* until the final hearing of complainant's suit in Utah."

Under neither bill is any demand for any relief made against the stockholders, no process could run against them in case of favorable judgment in the first suit, and it would be indifferent to the complainant where or by whom the stock was held. Spencer Trask & Co. are entire strangers to them and to all persons owing them any duty, and no fund reserved by that firm belongs to complainant or could be reached by him, nor is such relief asked. The entire absence of privity between the parties in the second suit to any and all parties in the first suit or to the subject matter thereof; the entire absence of any duty from the defendants personally or as trustees to the complainant, forbids even the suggestion that this suit is ancillary in its nature. A suit is not necessarily ancillary

solely because it pretends to be such, and much less because the complainant so names it. The present bill on its face shows that it cannot be ancillary. The legal relation of the defendants to the former suit as attempted to be alleged is impossible. Mr. Peabody's affidavit doubtless stated his view that the fund was advan-
732 tageous rather than inimical to the complainant and such is the fact, but such expression of view does not estop the firm from procuring a judicial interpretation of the agreement between them, the vendors and vendees. But if this suit be not ancillary this court has not jurisdiction, for two of the defendants and the complainant are residents of the State of New Jersey while three are residents of New York. The complainant does not call attention to any authorities to the effect that jurisdiction of less than all the individual co-partners would be sufficient, while the defendants multiply decisions tending in the holding or expression of views to show that jurisdiction may be acquired only in case all the partners be brought duly before the court.

Stone *v.* South Carolina, 117 U. S. 430;
Mason *v.* Eldred, 6 Wall. 231, 235;
Adams *v.* May, 27 Fed. Rep. 907;
Duchesse d'Auxy *v.* Porter, 41 Fed. Rep. 68;
Bell *v.* Donohue, 17 Fed. Rep. 710.

The conclusion to which these authorities point is aided by
Hooe *v.* Jamieson, 166 U. S. 395–399;
Gage *v.* Carraher, 154 U. S. 656;
Holland *v.* Ryan, 17 Fed. Rep. 1.

A decree will be entered dismissing the bill, with costs.

EDWARD B. THOMAS, *U. S. J.*

(Endorsed:) Raphael *v.* Trask. Opinion, Thomas, J. U. S. circuit court, southern district of New York. Filed Aug. 29, 1902. John A. Shields, clerk.

733 At a stated term of the circuit court of the United States, held in and for the southern district of New York, at the rooms of the said court in the United States court house and post office building in the city of New York, on the 15th day of November, 1902.

Present: Hon. Edward B. Thomas, judge.

NATHANIEL W. RAPHAEL, Complainant,
versus
SPENCER TRASK, GEORGE FOSTER PEABODY, EDWIN M. BULKLEY, Charles J. Peabody, and Acosta Nichols, Defendants.

This cause having been brought on by the complainant for argument upon the complainant's bill of complaint and upon the plea filed by the defendants, and the cause having been argued by Mr. Easton, of counsel for the complainants, and Mr. Shepard, of counsel for the defendants, it is

Ordered, adjudged and decreed that the said plea of the defendants be, and the same hereby is, sustained, and that thereupon the said bill of complaint be, and the same hereby is, dismissed with costs; and that the injunction granted herein *pendente lite* be, and the same hereby is, vacated: Provided that the complainant shall perfect his appeal and file a supersedeas bond in the sum of fifteen hundred dollars ($1500.) the said injunction to be and remain in force pending the appeal.

EDWARD B. THOMAS, *U. S. J.*

734 (Endorsed:) U. S. circuit court, southern district of New York.—Nathaniel W. Raphael *versus* Spencer Trask and others.—Decree.—Smith & Harkness, solicitors for defendants, 26 Liberty street, New York city.—U. S. circuit court, southern district of New York, Filed Nov. 17, 1902, John A. Shields, clerk.

735 In the Circuit Court of the United States for the Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant,
against
SPENCER TRASK, GEORGE FOSTER PEABODY, EDWIN M. Bulkley, Charles J. Peabody, and Acosta Nichols, Defendants. } In Equity.

On reading and filing the verified amended complaint in the above entitled suit, and the affidavit of Charles Locke Easton, complainant's solicitor therein, and upon consideration of the same, and on other good cause shown, it is

Ordered that the defendants in this case and each of them be and appear in this court at the United States court room in the city of New York on Monday October 20th 1902, at 11 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, then and there to show cause, if any they can, why the complainant should not be granted leave to amend his said bill of complaint, as set forth in the verified amended bill of complaint herewith attached; and it is

Further ordered that the said defendants take no further proceedings in said action until the further order of this court.

And on the hearing of this order to show cause the plaintiff may use the original bill of complaint, and the plea of the said defendants thereto, and the exhibits attached to the original bill of
736 complaint, and the opinion of his honor Edward B. Thomas, in allowing the said plea of the said defendants, and order of Judge Brown of May 1st, 1901.

That a copy of said amended bill of complaint duly verified and the said affidavit of Charles Locke Easton the solicitor of the said complainant, together with a copy of this order be served upon the

solicitors of the said defendants, Messrs. Parsons, Shepard & Ogden, five days before the return day.

Utica, Sept. 15th, 1902.

ALFRED C. COXE, *U. S. J.*

Note.

To the defendants:

I have made this motion returnable October 20th because it is the first day that I hold court in the city of New York. Should you desire to have it disposed of at an earlier day and will consent to argue it outside the southern district of New York, I will hear the motion at Utica on Sept. 30th at the U. S. court house at Utica, at 11 o'clock a. m. In case you elect to argue the motion at Utica you are to give Mr. Easton five days' written notice of such election.

A. C. C.

(Endorsed:) U. S. circuit court, southern district of N. Y.—Nathaniel W. Raphael, complainant, *vs.* Spencer Trask, *et al.*—Order to show cause. Charles Locke Easton, solicitor for compl't, 220 Broadway, N. Y.—Copy received, Parsons, Shepard & Ogden, Sept. 16, 1902.—U. S. circuit court, southern district of New York, Filed Nov. 7, 1902. John A. Shields, clerk.

737 In the Circuit Court of the United States for the Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant,
against
SPENCER TRASK, GEORGE FOSTER PEABODY, EDWIN M. BULKLEY, Charles J. Peabody, and Acosta Nichols, Defendants.

To Parsons, Shepard & Ogden, solicitors for defendants:

Please take notice that at 11 o'clock a. m. on October 20th, 1902, or as soon thereafter as counsel can be heard, the said plaintiff will apply to his honor, Justice Coxe, in the room occupied by him as a court room, in the United States court room, in the city of New York, for permission to file a supplemental bill of complaint in the above entitled action, which application will be based upon the verified petition of said complainant, a copy of which is herewith attached.

CHARLES LOCKE EASTON,
Solicitor for Plaintiff, Office & P. O. Address,
229 Broadway, Manhattan, New York City.

738 In the Circuit Court of the United States for the Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant,
vs.
SPENCER TRASK, GEORGE FOSTER PEABODY, EDWIN M. BULKLEY, Charles J. Peabody, and Acosta Nichols, Defendants.

To the honorable the judges of the United States circuit court for the southern district of New York, in equity sitting:

The petition of Nathaniel W. Raphael, the above complainant, respectfully shows: That on the — day of April, 1901, your petitioner filed his bill of complaint in this honorable court against Spencer Trask, George Foster Peabody, Edwin M. Bulkley, Charles J. Peabody and Acosta Nichols, for the purpose of subjecting a certain fund referred to in said bill of complaint, to the jurisdiction of said court, for an injunction and for other relief.

That on September 15th, 1902, an order was issued by Justice Coxe of said court, directing the defendant to show cause on Monday October 20, 1902, at 11 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, at the United States court room in the city of New York, why the complainant should not be granted leave to amend his said bill of complaint, as set forth in a
739 verified amended bill of complaint, attached to and made part of said order to show cause.

Your petitioner further shows that since the filing of said original bill of complaint, the said shares of the capital stock, viz: the ten million dollars of the common stock of the Rio Grande Western Railway Company have been purchased and paid for by the Denver & Rio Grande Railroad Company, at $80 per share in pursuance of the said vendor's agreement referred to in said original bill of complaint, and the said common shares have all been delivered to the said Denver & Rio Grande Railway Company, and the greater portion of the preferred stock of the Rio Grande Railway Company have also since the filing of said original bill been exchanged for the preferred shares of the capital stock of the Denver & Rio Grande Railroad Company, on the basis of ten shares of the Rio Grande Railway Company for eleven shares of the Denver & Rio Grande Railroad Company.

Your petitioner further shows that the said Missouri Pacific Railroad Company referred to in said proposed amendment to said original bill, has since the filing of said original bill, purchased a controlling interest in all of the shares of the capital stock of the Denver & Rio Grande Railroad Company, and that in pursuance of said scheme, as set forth in said original bill and said proposed amendment to said original bill, the said Missouri Pacific Railway Company is now in control of the board of directors and officers of the Rio Grande Railway Company, and the Denver & Rio Grande Railway Company. That the following are the officers and directors of the Rio Grande Railway Company, viz: George J. Gould of New York, chairman; Edward P. Jeffery, president, Denver, Colo-
740 rado; Russell Harding, St. Louis, Mo. vice-president; Stephen Little, New York city, secretary; J. W. Gilluly, Denver, treasurer. Directors, George J. Gould, Frank J. Gould, Howard Gould, Jacob H. Schiff, Edward H. Harriman, Winslow S. Pierce, R. M. Galloway, all of New York city; Russell Harding of St. Louis,

and E. T. Jeffery of Denver. New York office of the company, 195 Broadway.

The following are the officers and directors of the Denver & Rio Grande Western Railroad Company: George J. Gould, chairman; E. T. Jeffery, president; Stephen Little, secretary and controller; J. W. Gilluly, treasurer; New York office of the company, 195 Broadway. Directors—George J. Gould, Winslow S. Pierce, Edward H. Harriman, Arthur Coppell and Mortimer L. Schiff, all of New York city and C. W. Warner and Russell Harding of St. Louis, Mo. Edward O. Wolcott and E. T. Jeffery of Denver.

Officers and directors of the Missouri Pacific Railway Company: George J. Gould, president; Frank J. Gould, vice-president; C. G. Warner second vice-president, Russell Harding, third vice-president A. H. Calif, secretary and treasurer. New York office of the company 195 Broadway. Directors, George J. Gould, Russell Sage, John P. Munn, Elwin Gould, Fred T. Gates, E. Parmlee Prentice, Samuel Sloan, Louis Fitzgerald, Howard Gould, Frank J. Gould W. K. Bixby, C. G. Warner and Russell Harding.

Your petitioner further shows upon information and belief that since the filing of said original bill of complaint, out of said moneys realized from the sale of said common shares of the Rio Grande Western Railway Company there has been set aside as a special trust, in pursuance of the offer set forth in the advertisement referred to in the original bill of complaint, and which said fund, your petitioner is informed and believes amounts to about the sum
741 of three millions of dollars and that the said fund is now in the possession and control of said defendants and has been since the said shares were paid for by the said Denver & Rio Grande Railroad Company.

Your petitioner therefore prays that leave may be granted to the complainant to file a supplemental bill of complaint against the said defendants Spencer Trask, George Foster Peabody and Acosta Nichols, in case said proposed amendments to said original bill of complaint are allowed to be filed on the hearing of the said order to show cause; and that said supplemental bill of complaint set out the said facts as set forth, in regard to the consummation of the sale of the said shares of the Rio Grande Railway Company, to the said Denver & Rio Grande Railroad Company, and in turn a sale of the controlling interest of the shares of the capital stock of the Denver & Rio Grande Railroad Company, to the said Missouri Pacific Railway Company, and the fact that said fund of three millions of dollars has been created and is now in the possession and control of said last named defendants and that the said supplemental bill contain- a specific prayer that said fund be turned over to a trust company or receiver or trustee to be selected by this honorable court pending this suit, and that in case the complainant shall succeed in his said suit referred to in said original bill of complaint, pending in the United States circuit court for the district of Utah that said fund be subjected to the payment of any deficiency judgment which the complainant may sustain in case of a foreclosure and sale and

an accounting being had as prayed for in the said suit pending in said Utah court, and for such other relief as complainant's
742 case may require, and as to your honors may seem just and equitable.

NATHANIEL W. RAPHAEL,
By CHARLES LOCKE EASTON,
His Solicitor.

UNITED STATES OF AMERICA,
Southern District of New York, City & County of New York, } ss:

Nathaniel W. Raphael, being first duly sworn deposes and says: That he is the person named as petitioner in the above entitled petition, and that he has read the same, and that the facts as therein stated are true, except as to such matters as are therein stated upon information and belief, but as to those matters he states he believes them to be true.

NATHANIEL W. RAPHAEL.

Sworn and subscribed to before me this 16 day of October, 1902.
PHILIP L. LIEBMAN,
Notary Public, N. Y. Co.

743 (Endorsed:) In the circuit court of the U. S., southern district of New York.—Nathaniel W. Raphael, complainant, *vs.* Spencer Trask *et al.*, defendants.—Petition for supplemental bill and notice.—Charles Locke Easton, plaintiff's attorney, 229 Broadway, N. Y. city.—Copy received Oct. 16th, 1902. Parsons, Shepard & Ogden, att'ys for def'ts.—U. S. circuit court, southern district of New York, Filed Oct. 28, 1902, John A. Shields, clerk.

744 In the Circuit Court of the United States for the Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant,
vs.
SPENCER TRASK ET AL., Defendants. } In Equity.

UNITED STATES OF AMERICA,
Northern District of New York, } ss:

Charles Locke Easton, being first duly sworn, deposes and says: That he is the solicitor for complainant in the above entitled suit, and that the annexed copy of the original bill of complaint was filed in the office of the clerk of the United States circuit court for the southern district of New York, on the — day of April, 1901; and that the annexed copy is a true copy of said bill of complaint; that the defendants on the 8th day of July, 1901, filed a plea to the jurisdiction of said court by Messrs. Parsons, Shepard & Ogden as their solicitors, and that the annexed copy of said plea is a true copy of the same. That on the — day of July, 1902, the cause was

brought on before his honor Judge Thomas, sitting as United States circuit judge for the southern district of New York, for argument upon complainant's bill of complaint, and upon said plea filed by said defendant, and upon the 28th day of August, 1902, his honor Judge Thomas filed his opinion allowing the said plea of the said de-
745 fendants, a copy of which opinion is herewith attached and the same is a true copy thereof; on the 3d day of September, 1902, the solicitors for the said defendants served upon deponent as the solicitor for said complainant, a draft of an order which the solicitors for defendant would present for settlement to his honor, Judge Thomas, at his chambers in the U. S. court house, in the Post Office building, in the county of New York, on the 8th day of September, 1902, at 10.30 o'clock in the forenoon of that day.

Deponent further says that he met a representative of the solicitors of defendant at the chambers of Judge Thomas, in New York city, at the time designated, when it was learned that Judge Thomas was still on his vacation at Sudbury, Vermont, and that he would not be in New York city for some time. Deponent then and there notified the representative of the solicitors of said defendants that he desired, before the said order dismissing said suit should be entered, to be allowed to ask leave of the court under equity rule 35, of this court, to amend complainant's bill of complaint in order to avoid the plea to the jurisdiction of the court, and to make such other amendments to the bill of complaint as he might deem best. The clerk of the court, in the office of John A. Shields, Esq., clerk of said court, stated that he understood that Judge Thomas would be in New York city on the 18th of September inst. to hear motions concerning such cases as he had considered; thereupon the representative of said solicitors for defendants stated to deponent that he would call up for settlement of the order
746 before his honor Judge Thomas on the 18th inst. or when Judge Thomas should return to the city, and would duly notify deponent thereof; on the 9th day of September, 1902, deponent was informed over the telephone by Messrs. Parsons, Shepard & Ogden, solicitors for defendant, that they had delivered a draft prepared by the solicitors for defendants to the clerk of the United States circuit court, for the southern district of New York, to be signed by Judge Thomas. When deponent learned this fact he notified Messrs. Parsons, Shepard & Ogden by telephone that he wished to be heard before Judge Thomas could enter said order, upon a motion for leave to amend complainant's bill of complaint. On September 10th, 1902 deponent wrote Judge Thomas at Sudbury, Vermont, and stated that before the order of dismissal should be entered deponent desired to apply for an order for leave to amend the bill of complaint, and would like to know when his honor, Judge Thomas would be in the city of New York to hear said motion. Judge Thomas replied that he would not be in the city of New York, before the 8th day of October, next; that he would not hear deponent's motion for an order for leave to amend the bill of complaint, as at that time he would take up his criminal calendar; deponent

thereupon on the 11th day of September inst. wrote Judge Thomas that inasmuch as he could not hear the application for leave to amend the bill of complaint deponent would apply to his honor, Justice Alfred C. Coxe at Utica, N. Y. for leave to amend the bill of complaint, and deponent requested Judge Thomas to withhold the entering of said order of dismissal until the hearing of deponent's application to his honor, Justice Coxe.

747 Deponent further says that the amendments to the said bill of complaint herewith submitted by complainant are made in good faith, and not for the purposes of delay in said action, and that deponent believes that no injustice will be done to the said defendants by the granting of leave to complainant to amend his bill of complaint; while, on the contrary deponent believes that if said order is not granted allowing complainant to amend said bill of complaint, that great injustice will be done to the said complainant.

Deponent further says that on the first day of May, 1901, after said original bill of complaiat had been filed, in said action, that his honor, Judge Addison Brown, district judge of the said southern district of New York, sitting as United States circuit judge granted an order against the said defendants restraining them from paying out or parting with the fund or moneys for indemnity to them or special trust which shall come to or be in their hands or under their control pursuant to their advertisement, bearing date the 2d day of April, 1901, and referred to in the said original bill of complaint, a certified copy of which order is herewith attached and made part hereof.

Deponent further says that said order is still in force and remains unvacated, but deponent believes that if the defendants are allowed to enter the said order dismissing said suit thereby vacating said order of Judge Brown, that the said moneys referred to in said order of Judge Brown will be immediately paid out by the said defendants as a special trust, to the great injury of complainant.

748 Deponent further says that his honor, Justice Lacombe has declined to hear any matter pertaining to the above entitled suit, because he says he is disqualified from doing so by reason of having interests in the said bonds and stock of the said Rio Grande Western Railway Company. Deponent further states that his honor Judge Thomas stated when deponent applied to him while sitting as U. S. circuit judge to hear the plea of defendants to the bill of complaint, that it was at great inconvenience that he heard the same in July last, and that he could not give any further time to the hearing of the suit or deponent's proposed application for leave to amend the bill of complaint.

And further deponent saith not.

CHARLES LOCKE EASTON.

Subscribed and sworn to before me this 15th day of September, 1902.

C. W. HIGGISON,
Notary Public, Oneida Co., N. Y.

(Endorsed:) U. S. circuit court, southern district of N. Y.—Nathaniel W. Raphael, complainant, *vs.* Spencer Trask *et al.*—Affidavit of Charles Locke Easton.—C. L. Easton, solicitor for compl't 229 Broadway, N. Y. C.—U. S. circuit court, southern district of New York, Filed Nov. 7, 1902, John A. Shields, clerk.

749 In the Circuit Court of the United States for the Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant,
against
SPENCER TRASK, GEORGE FOSTER PEABODY, EDWIN M. BULKLEY, Charles J. Peabody and Acosta Nichols, Defendants. } In Equity.

To the honorable judges of said court, in chancery sitting:

Nathaniel W. Raphael, by leave of the court in that behalf first had and obtained, brings this his amendment of his bill of complaint against said defendants.

And thereupon your orator complains and makes amendment of his said bill of complaint herein as follows:

First. In folio 2 and folio 27, strike out the names of E. M. Bulkley and Charles J. Peabody, as defendants.

Second. And your orator makes further amendment of his said bill of complaint, at the commencement (of folio 22) of the paragraph "Your orator shows unto your honors as he is informed and believes" and insert after the word "believe" "The Denver & Rio Grande Railroad Company referred to in said advertisement is a corporation incorporated under the laws of the State of Colorado, with the capital stock of 38 million dollars of common stock and $23,580,000 of preferred stock; it operates 1674 miles of railroad in the State of Colorado; it has a bonded indebtedness of $43,140,000, or a total of capitalization and
750 bonds per mile of road owned of $62,645. The gross earnings of the road per mile of road owned is $6,121; the net earnings per mile of road owned is $2,042; the fixed charges per mile of road owned is $1,217. This statement is the financial condition of the road for the year 1900; the road has paid no dividends upon its common stock, but has paid on its preferred stock four per cent. per annum, semi-annually two per cent.; the range of prices in the New York Stock Exchange for the year 1900, for the common stock is 62½ to 34½ cents per share on the par value per share of one hundred dollars each; and the preferred has ranged during the same period at 64½ to 87½ cents per share on the par value per share of one hundred dollars each, while during the same period the gross earnings per mile of road of the Rio Grande Western Railway Company of 620 miles of road owned and operated was $7,276, and the net earnings per mile of road owned and operated were $2,686, and the fixed charges were $1,171 per mile, in other words the Rio Grande Western Railway

Company's gross earnings per mile of road, earned for the year 1900 were $1115. per mile greater than the gross earnings of the Denver & Rio Grande Railroad Company for the same period, and the net earnings of the Rio Grande Western Railway Co. for the same period was $644. per mile of road owned and operated for that same period more than the net earnings of the Denver & Rio Grande Railroad Co. per mile of road owned and operated during that same period.

Your orator further shows as he is informed and believes the object of the proposed purchase of the common stock and the preferred stock by the said Colorado road of the said Utah road
751 (The Rio Grande Western Railway Company) was to enable the surplus earnings of the Utah road to be acquired by the said Colorado road for the purpose of making up the deficiency of earnings of the Colorado road.

Your orator further shows, as he is informed and believes, that the Missouri, Pacific Railway Company, a corporation incorporated under the laws of the State of Missouri, operates 5,324 miles of railroad and that said railroad makes close connection with the said Colorado road at Pueblo in the State of Colorado, and that as your orator is informed and believes, *that* the said scheme of the purchase of the said Utah road by the Colorado road is a part and parcel of a scheme for the said Missouri Pacific when the said Colorado road is in control, and in ownership of the said Utah road, to acquire the ownership and control of a majority of the stock of the said Colorado road; and your orator is informed and believes that when said purchase and control shall have been secured as aforesaid by the Missouri Pacific Railway Company it is the intention and purpose of the interests in control of the Missouri Pacific Railway Company to substitute new directors and officers for those now in control of the said Utah road and the said Colorado road to be selected by the interest controlling the said Missouri Pacific railway; and that the railways owned and operated by the said respective corporations, the said Rio Grande Western Railway Company, and the Denver & Rio Grande Railroad Company, will become a part and parcel of the railroad system of the said Missouri Pacific Railway Company, and that the earnings of the Utah road over and above the neces-
752 sary amount required to pay the fixed charges of the bonded indebtedness of the Utah road, will be used by the Missouri Pacific railway after applying whatever amount is required out of the said net earnings of the Utah road and the Colorado road towards paying their respective fixed charges to pay the obligations of the Missouri Pacific Railway Company. In other words, as your orator is informed and believes, the said scheme will tend to divert to the control of the Missouri Pacific Railway Company, and the Denver & Rio Grande Railroad Company, the present profitable and prosperous condition credit and surplus earnings of the Utah road to build up the want of credit and want of prosperous condition and want of surplus earnings of the Colorado road and the Missouri road.

Your orator further shows that in the year 1900, the Missouri

Pacific Railway Company's gross earnings per mile of road owned were $5,274. and the net earnings were $1414 per mile of road owned, and the fixed charges were $1224 per mile of road owned. The capital stock of the Missouri Pacific is $47,500,000, its bonded indebtedness is $128,580,000; its combined capital stock and bonded indebtedness per mile of road owned is $35,809. The range of prices in the New York stock exchange for the shares of the capital stock of the Missouri Pacific for the year 1900 was 39¾ cents per shares to 72½ per share of the par value of $100. each.

Your orator further shows unto your honors, as he is informed and believes, that the owners of the shares of the capital stock, out of the proceeds of the sale of which the said fund referred to in the said advertisement of Spencer Trask & Company, was allowed
753 to be created, agreed the same should be created for the purpose of paying out of said fund the amount which might be found to be due the complainant upon his said bonds in case he succeeded in his said suit in Utah; and that at the time that the said "fund" was agreed to be created and at the time complainant commenced his suit in Utah the said Spencer Trask & Company were the fiscal agents of the Rio Grande Western Railway Company; that the said Spencer Trask and George Foster Peabody were directors in the board of directors of the Rio Grande Western Railway Company, and George Foster Peabody was vice-president of said road and a member of the executive committee of the board of directors of said road; and the said defendants, George Foster Peabody and Spencer Trask and Acosta Nichols well knew at the time the said "fund" was agreed to be created for the purposes aforesaid that in case complainant succeeded on a final hearing in the Utah case, in obtaining a deficiency decree, against the Rio Grande Western Railway Company, on an accounting of the net earnings, as prayed for in the bill of complaint, filed in that suit in Utah, and after a foreclosure sale of the said 44 miles of road as security for complainant's said bonds said defendants well knew that the said Rio Grande Western Railway Company would not be able to pay the said deficiency judgment in case said scheme of acquiring the Utah road by the Colorado road succeeded and that the said "fund," which was agreed on the part of the stockholders consenting to the creation of said fund, that it was agreed by said stockholders was to be substituted and used in place of the surplus net earnings of the Utah
754 road which might be diverted as aforesaid in carrying out the scheme as aforesaid.

Your orator further shows upon information and belief and so charges the fact to be that the said defendants well knew at the time when said "fund" was created that the said forty-four miles of road in litigation in the Utah suit was inadequate security for the payment of complainant's bonds, and that said fund was created as a trust fund to make up any deficiency that might exist in case of a sale and foreclosure of said 44 miles of road, and that when the said defendants published the said advertisement it was expressly intended and designed not only by the said ninety per cent. of the

shares of the common stock of the Utah road but on the part of the said defendants and by the purchasers of the Utah road that said fund should be made subject to the control and determination and the disposition of the Utah suit; thereby your orator charges the said defendants, as he is informed and believes, made representations to the said purchasers of the said shares of the capital stock of the said Utah road, to wit, to the said Denver & Rio Grande Railroad Company, and the said Missouri Pacific Railway Company that complainant's claim if established in the Utah suit would be paid out of the said fund; and your orator avers upon information and belief that the said purchasers of said shares of said last named railroad proposed to make the said purchase of the said Utah road with the understanding and intention that the said fund should be so used in liquidating the claim of complainant when established in the Utah suit.

Your orator further shows unto your honors that the Bingham branch of the said 44 miles of road in litigation in the Utah suit produces greater gross earnings per mile of road than any
755 portion of the Rio Grande Western Railway systems; that branch is situated in the western mountains of the Jordan valley, in the great copper, lead and other mining regions of that locality, and when the said purchasers of the Utah road agreed to make the said purchase, it was with the express purpose and condition that the Bingham road should not be foreclosed and sold under complainant's mortgage, in case complainant succeeded in establishing his claim in the Utah suit, but that said "fund" should be used in liquidating complainant's claim and prevent a foreclosure of the said 44 miles of road.

Your orator further shows that the said ninety per cent. of the said common stock of the Rio Grande Western Railway Company, referred to in the said advertisement of Spencer Trask & Company, was held and owned at the time of said option, by the Rio Grande Western Construction Company, which company had built and constructed the Rio Grande Western Railway Company, and also held by George Foster Peabody and William J. Palmer, the president of the Rio Grande Western Railway Company, and Spencer Trask & Company, who collectively controlled and owned a majority of the capital stock of the said construction company; and that it was the consent of the directors and officers of the said construction company and of William J. Palmer and George Foster Peabody and said defendant Spencer Trask that the said fund should be created for the purposes aforesaid and particularly to be used as a fund to pay off complainant's claim when established in the Utah suit. William J. Palmer is the president of the Rio Grande Western Railway Company, and with his stock in the Rio Grande Western Construction Company he had controlled, ever since the construc-
756 tion of the Rio Grande Western railway, the election of the board of directors of not only the construction company but of the Rio Grande Western Railway Company and has continued to be president of the said railway company ever since its creation.

Your orator further shows, and he is informed and believes, that the said Rio Grande Western Construction Company, the owner of said common stock of the said Utah road, and the said William J. Palmer and the said George Foster Peabody and Spencer Trask well knew and apprehended at the time — said proposed sale of the Utah road that if they carried out the said "scheme" of practically a consolidation of the Utah road with the Colorado road and it in turn with the Missouri Pacific Railway Company that the earnings of the Utah road would be dissipated by the large indebtedness and obligations and mileage of the Colorado and the Missouri roads, and that there would be no "fund" on a final hearing of the Utah suit to make good complainant's claims unless said fund was so created; and the vendors of the Utah road well knew that the said purchasers, to wit, the Colorado road and the Missouri roads would not become the purchasers of the Utah road unless a fund as proposed by the said advertisement of Spencer Trask & Co. was created to provide for the payment of complainant's said claim if successful in his Utah suit.

Your orator further shows that the said Charles J. Peabody and E. M. Bulkley, are junior members of the said firm of Spencer Trask & Co., and as your orator is informed and believes their interests in the said firm of Spencer Trask & Company
757 are very small; and your orator is informed and believes that said Spencer Trask and George Foster Peabody are the principal owners of the partnership interests of the said firm, and your orator avers that there is no intention of holding any of the members of the said firm personally liable on a money judgment, but that the object of this suit is to subject the said "fund" to the control of this court on the conclusion of the litigation in Utah; and that the reason your orator does not make said Charles J. Peabody and E. M. Bulkley parties defendant to this suit, is because they are residents and citizens of the State of New Jersey, the same State where your orator resides, and that the rights of your orator and the parties in interest in the said fund, your orator is informed and believes, can be litigated and determined completely in this action against the said defendants Spencer Trask, George Foster Peabody and Acosta Nichols without joining as defendants the said non-residents.

Wherefore your orator prays as he has before prayed in his original bill of complaint, except as against the said Charles J. Peabody and E. M. Bulkley; and further your orator prays that the said defendants Spencer Trask, George Foster Peabody, and Acosta Nichols may answer, but not under oath, such oath being hereby waived according to the practice of this court, all and singular the matters stated and charged in said original bill of complaint and those hereinbefore stated and charged in this, your orator's amended bill of complaint.

CHARLES LOCKE EASTON,
Solicitor for Complainant.

758 Office and post office address, 229 Broadway, N. Y. city.

CHARLES LOCKE EASTON, *Of Counsel.*

UNITED STATES OF AMERICA,
Southern District of New York, City and County of New York, } ss:

Nathaniel W. Raphael, being first duly sworn, deposes and says that he is the complainant in the above entitled suit, and that he has read the foregoing amendments to his original bill of complaint filed in said action, and that he knows the contents thereof and that the facts therein stated are true, except as to such matters as are therein stated upon information and belief, but as to those matters he states he believes them to be true.

Deponent further says that he believes that unless an order to show cause is issued by this honorable court against the said defendants in said original suit returnable at an early date according to the rules of practice of this court why complainant should not be granted leave to amend his said original bill of complaint herein that an order will be entered by his honor Edward B. Thomas, before whom the sufficiency of a plea on the part of the said defendants has been heard to the jurisdiction of said court in this action will be entered of record in said cause allowing said plea and dismissing said bill of complaint.

Your orator therefore prays that said rule to show cause
759 be so issued and that leave be granted your orator to amend said bill of complaint as aforesaid.

And further deponent saith not.

NATHANIEL W. RAPHAEL.

Subscribed and sworn to before me this 13th day of September, 1902.

SIDNEY J. COWEN,
Notary Public, N. Y. Co.

(Endorsed:) U. S. circuit court, southern district of New York.—Nathaniel W. Raphael, complainant, *vs.* Spencer Trask *et al.* defendants—Amended bill of complaint.—Charles Locke Easton, solicitor for complainant, 229 Broadway, N. *N.* city.—U. S. circuit court, southern district of New York, Filed Nov. 7, 1902, John A. Shields, clerk.

760 In the Circuit Court of the United States for the Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant,
against
SPENCER TRASK, GEORGE FOSTER PEABODY, EDWIN M. Bulkley, Charles J. Peabody, and Acosta Nichols, Defendants. } In Equity.

UNITED STATES OF AMERICA, }
Southern District of New York, } ss:

George Foster Peabody, being duly sworn, says: I am a member of the firm of Spencer Trask & Company and one of the defendants in this action. This suit has been brought by the complainant as an ancillary suit or otherwise to make effective such judgment or decree as the complainant might secure in a certain other suit brought by the complainant in January, 1901, in the United States circuit court for the district of Utah against The Rio Grande Western Railway Company and other defendants. Such Utah suit was brought to redeem from foreclosure sales two spurs of the Rio Grande Western railroad, the same being known as the Wasatch and Jordan Valley railroad and the Bingham Canyon and Camp Floyd railroad. Prior to the complainant's institution of such Utah suit, the Rio Grande Western Railway Company or its predecessor in title had been in possession of such spurs of railroad under foreclosure of mortgages thereon, and such possession had
761 continued uninterruptedly and without the suggestion of any adverse claim for about nineteen years. The complainant, a dealer in defaulted securities, bought up a large number of second mortgage bonds on the said spurs secured by a mortgage which had been cut off by the foreclosures in 1881 and 1882. As he testified in the Utah suit he paid for those bonds at the rate of $1.00 or $1.50 per bond of $1,000. He claimed in the suit that he was entitled to recover the par value of the bonds and interest for 18 or 19 years.

The Utah suit was brought to final hearing in April, 1902, at St. Louis before Judge Elmer B. Adams upon an order setting the cause down for argument before him. A large amount of testimony had been taken. In June, 1902, Judge Adams made a decree dismissing the bill. A copy of such decree and also a copy of Judge Adam's opinion are hereto annexed. The court held that the complainant was not a holder of the bonds in good faith. He also held that the foreclosures, under which the Rio Grande Western Railway Company held title, were valid, and also that they were protected by the lapse of time. In the spring of 1901 my firm, on behalf of the owners of a majority of the capital stock of the Rio Grande Western Railway Company were engaged in negotiations for the sale of such stock to representatives of the Denver & Rio Grande Railway Company. While such negotiations were pending the complainant moved for a receiver of the said spurs of railroad. That motion was argued at St. Louis and was denied by the Hon. Amos M. Thayer, circuit judge for the eighth circuit, which includes Utah. The said suit brought by the complainant against the
762 Rio Grande Western Railway Company, and the assertion of the complainant's claim therein, were believed by my firm to be in bad faith and solely for the purposes of discrediting the sale of the stock of the Rio Grande Western Railway Company. My said firm was advised that there were no merits in the suit, but that, nevertheless, the complainant made a claim amounting to upwards

of a million dollars, and that the purchasers of the stock could not be expected to investigate the merits of the claim. My firm gave, therefore, its individual guaranty to the purchasers of the stock against the complainant's claim, and advised the several vendors of the stock who were represented by my said firm that my firm would retain of the proceeds of the stock such amount as counsel should advise would be proper to secure my said firm against such claim. The amount so retained upon the advice of counsel was $20,000. The complainant's assertion that the amount retained was $3,000,000, or that a trust fund of $3,000,000 was constituted is completely and, in my opinion, recklessly false. The amount retained was, as I have stated, the sum of $20,000.

At the time when my firm was about to consummate such sale of common stock of the Rio Grande Western Railway Company,—the sale of such stock and of certain other interests being made for about $15,000,000,—the complainant began this suit in this district, and procured from the Hon. Addison Brown, then district judge, and without any notice, an order restraining the defendants from selling such stock of the Rio Grande Western Railway Company.

That order was served upon the defendants upon the day
763 which the complainant alleged to be the last day for the delivery of such stock under the agreement made between my said firm and the proposed purchasers of the stock. This was done, as I am informed and as I verily believe, solely to compel a settlement of the claim made in Utah against the Rio Grande Western Railway Company. Upon application made to Judge Brown he instantly vacated the injunction, and then made, upon the assent of the counsel of my firm and in order to avoid any delay, an order restraining the defendants until the further order of the court, from parting with such moneys as they should hold in trust to secure themselves against their guaranty given as aforesaid. Such an order would not, of course, injure my said firm during the pendency of the Utah suit inasmuch as during such pendency my said firm was perfectly certain to retain in hand the fund it had to indemnify itself against such guaranty. Now that the Utah suit has been dismissed my said firm desire to distribute the fund. The same amounts, as I have said, to the sum of $20,000.

The defendants on or about the 8th day of July, 1901, filed a plea to the jurisdiction of this court. The hearing upon the bill of complaint and the plea was had before Judge Thomas, sitting as United States circuit judge for the southern district of New York, on the 11th day of July, 1902. The jurisdiction of the court was denied on the ground that there was no Federal question involved; that two of the defendants were citizens of the same State as complainant;

and that this suit was not ancillary to the Utah suit. Upon
764 the argument before Judge Thomas it was suggested, as I am informed by my counsel and believe, that the court might retain jurisdiction as against the defendants other than those who were citizens of the same State as complainant. I annex hereto a

copy of the opinion of Judge Thomas from which it appears that this point was decided by him adversely to the complainant.

As I am informed by my counsel and verily believe, the sole purpose of the proposed amendment is to confer jurisdiction upon the court by omitting from the suit the two defendants Edwin M. Bulkley and Charles J. Peabody; but those defendants are members of the said firm of Spencer Trask & Co. In his proposed amended bill the complainant states that the said "Charles J. Peabody and E. M. Bulkley are junior members of the said firm of Spencer Trask & Company and * * * their interest in the said firm of Spencer Trask & Company is very small." This allegation is made as a reason for omitting them from the bill, although they are members of the firm of Spencer Trask & Co. The allegation that the interests of Messrs. Charles J. Peabody and Edwin M. Bulkley in the said firm are very small is false and, as I believe, recklessly false. I do not believe that the complainant has any information of that kind or any warrant for making such a statement. The defendants Charles J. Peabody and Edwin M. Bulkley have a large and very substantial interest in the firm of Spencer Trask & Co. and are active and important members of that firm. Apart, however, from this consideration, I am informed by my counsel and believe
765 that whether their interests are large or small the complainant cannot maintain his suit against the firm of Spencer Trask & Co. without joining them as defendants; and I am likewise informed and believe that such is the substance of the decision of Judge Thomas made herein.

This suit is brought, as I verily believe, in bad faith and for the purpose of securing an opportunity to subject the defendants to annoying examinations with respect to the sale of the common stock of the Rio Grande Western Railway Company and with respect to confidential matters between my firm and the former holders and also the purchasers of such stock,—matters in no way related to the claim of the complainant against the Rio Grande Western Railway Company itself. The complainant does not have and never has had or claimed to have and has never asserted any claim against the holders of the stock of the Rio Grande Western Railway Company.

Unless the decree dismissing the Utah suit shall be reversed, there is no foundation of any kind for the present suit in which the complainant seeks to enforce a pretended security for the payment of the claim, asserted by him in the Utah suit, against the Rio Grande Western Railway Company. As that suit has been dismissed there is no imaginable propriety in any continuance of this suit. The counsel of the Rio Grande Western Railway Company sought to speed the hearing of the appeal which the complainant has taken from such decree of dismissal. As I am informed by such
766 counsel and verily believe, it was practicable, upon the assent of the complainant, that the appeal should be heard at St. Louis in December, 1902, instead of being delayed until September, 1903, at Denver, Colorado. I annex hereto copies of correspondence between the counsel of the Rio Grande Western Railway Company

and the complainant's counsel, showing the refusal of the complainant's counsel to speed the hearing of such appeal. Instead the complainant's effort is to keep his appeal pending in Utah, and meantime to press on the present suit.

The statements I have made in this affidavit with respect to the facts of the Utah suit are based upon the record in the said Utah suit as stated to me by the counsel for Rio Grande Western Railway Company therein.

GEORGE FOSTER PEABODY.

Sworn to before me, this 20th day of October, 1902.

THOMAS PLUNKETT,

[SEAL.] *Notary Public* (100), *New York County, N. Y.*

767 In the Circuit Court of the United States for the District of Utah.

NATHANIEL W. RAPHAEL, Complainant,
vs.
WASATCH & JORDAN VALLEY RAILROAD COMPANY, The Rio Grande Western Railway Company, *et al.*
394. On Final Submission.

Memoranda of Conclusions.

ADAMS, *District Judge:*

To intelligently state the conclusions reached a very brief and general statement of the case will suffice.

The complainant is the owner of 579 of the total issue of 884 bonds, each for $1,000. issued by the Wasatch & Jordan Valley Railroad Company, hereinafter called the new Wasatch Company, on May 1, 1879; the payment of the bonds and interest thereon represented by coupons attached was duly secured by a mortgage executed by the new Wasatch Company, conveying its railroad consisting of about thirty-three miles of main line and extensions, to the Union Trust Company, of New York, as trustee; the new Wasatch Company was formed by the consolidation of two previously existing railroad companies, known as the Bingham Cañon & Camp Floyd Railroad Company, and the Wasatch & Jordan Valley Railroad Company, hereinafter called the "Bingham" and "Old Wasatch" companies respectively.

These last named companies had in 1873 and 1874 (each
768 for itself) executed mortgages upon their property to secure issue of bonds then made by them respectively. The last named mortgages were in the year 1881 foreclosed by the execution of powers of sale contained in them and the property conveyed thereby was purchased by a construction company for the Denver & Rio Grande Western Railway Company, and was afterwards deeded to and taken into possession by it. The last named company, in 1889 became consolidated with the State Line & Denver Railway Co., and thereafter existed as a new corporation under the name of The Rio Grande Western Railway Company, one of the defendants

herein. This new company took possession among other things of the properties acquired by its predecessor, the Denver & Rio Grande Western Railway Company at the foreclosure sales of the old Wasatch and Bingham roads and has continued in such possession from 1889 to the date of the institution of this suit, January 7, 1901.

It is claimed by the complainant that the foreclosures of the original old Wasatch and Bingham mortgages were so attended by irregularities and fraud, known to the Denver & Rio Grande Western Railway Company, that they were and now are voidable at the instance of the holders of the bonds secured by the mortgage of the new consolidated Wasatch Company of 1879 and that such bondholders occupying the position of junior mortgagees are entitled to avail themselves of such irregularities and fraud to secure an annulment of the foreclosure sales, and hold the defendant, The Rio Grande and Western Railway Company to the position of a mortgagee in possession of their property.

769–779 The prayer of the bill is to set aside the foreclosure sales of 1881, made under the subsidiary mortgages of the old Wasatch and Bingham roads; to be allowed to redeem the property sold at those sales; to secure an accounting with the Rio Grande Western Railway Company for the use and occupancy of the road by it and its predecessor, the Denver & Rio Grande Western Railway Company, from 1881 to the present date and to foreclose the mortgage of 1879 executed by the new Wasatch Company, securing the payment of the bonds now held by the complainant.

The complainant sues for himself and such other bondholders of the new Wasatch Company as should join in the suit and share in its burdens.

I have carefully considered all the proof in the light of the able and exhaustive arguments and briefs of counsel and have reached the conclusions which I shall state in a brief and comprehensive way only.

First. The complainant does not occupy the position of an innocent purchaser for value of the 579 bonds held by him.

He purchased these bonds in 1899 and found attached to them at the time of his purchase, defaulted coupons, representing interest for about 20 years then last past and a large majority of his bonds when purchased and paid for by him had the name of the certifying trustee punched out, thereby suggesting invalidity of the bonds themselves. He paid the nominal sum of less than $2.00 for each of the bonds with attached coupons so acquired by him. Under such circumstances complainant has only the rights of the original

780 holders of the bonds from whom he acquired them and is chargeable with knowledge of all the facts known by such holders.

Second. There is no substantial evidence of any fraud or improper conduct on the part of the trustees in the underlying mortgages of the old Wasatch and Bingham roads, participated in by the Denver & Rio Grande Railway Company, to prejudic-ally influence or affect

the sale of the properties to the Denver & Rio Grande Western Railway Company.

(*a.*) The properties brought their fair and reasonable value at the sale, and the claim that they were sold for such a grossly inadequate sum as to be in and of itself evidence of fraud, is entirely unsupported by the proof.

(*b.*) There was an undoubted default in the payment of interest on both the old Wasatch and Bingham bonds.

(*c.*) There is no substantial evidence that there were any net earnings in 1880 or 1881, of either of these last mentioned roads, applicable to the payment of interest on their bonds and certainly no evidence that any one, and much less any one whose acts are imputable to the defendant, The Rio Grande Western Railway Company or its predecessor, fraudulently concocted a scheme to divert net earnings to other objects for the purpose of creating a fictitious and false necessity to foreclose the mortgages.

(*d.*) Any and all other suggestions of actual fraud found either in the bill or argument by counsel are without substantial foundation.

781 Third. There were no such irregularities attending the execution of the powers of sale found in either the old Wasatch or Bingham mortgages as to invalidate the sales made.

First as to the old Wasatch mortgage,—

(*a.*) George M. Young was duly appointed trustee in the old Wasatch mortgage pursuant to the power reserved in the mortgage to that end; his appointment was duly made by the surviving trustee, Kountze, to succeed William A. Hall, deceased, and such appointment was consented to by the old Wasatch Company itself, by the action of its president in solemnly approving the same by an instrument in writing under his hand and seal.

If such action of the president without the authorization of the board of directors was irregular, the bondholders ratified and approved Young's appointment and action in making the sale, by their acceptance of the relief granted in the case of Young *v.* Spackman, wherein they appeared to assert their rights to the proceeds of the sale as made by Young and secured distribution by a final decree in the case.

(*b.*) There is, in the light of the provisions of the mortgage and the proofs before me, no merit in the contention of irregularity, because of the publication of the notice of sale in the "Daily Register" of New York, nor because of the adjournment of the sale from December 27, to December 29, 1881, nor because of the alleged failure on the part of the bondholders of the old Wasatch Com-

782 pany to make a formal request for the foreclosure.

Now as to the Bingham mortgage,—

The irregularities complained of in so far as they are similar to those in the old Wasatch sale, need no further consideration.

It is, however, contended that the recitation in the trustee's deed shows that six months had not elapsed after the default in payment of interest and before the sale was actually made as was required by

the mortgage itself. This, in my opinion, is clearly a misapprehension. The recital is: "Whereas on the 22nd day of March, 1881, the said company *had made* default" * * * "and such default *had continued* for more than six months and still continues." This recital fails to sustain the position of counsel for complainant. It does not purport to say that the default began March 22, 1881, but in plain terms says: That the default had been made before March 22nd, and continued for six full months before the sale was actually made.

The foregoing might dispose of the main issues before the court, but there are other most persuasive and conclusive reasons why complainant can not maintain his action.

The defendant, The Rio Grande Western Railway Company and its predecessor in right and title, the Denver & Rio Grande Western Railway Company were for the period of 19 years prior to the commencement of this action in open, notorious and continuous possession of the property now claimed by complainant, asserting in many ways the sole, exclusive and absolute title to the same,
783 not only as against the world in general, but particularly as against any and all the holders of the bonds of the old Wasatch and Bingham roads. They duly recorded the deeds, in terms conveying an absolute title to them; they took possession under such deeds and immediately proceeded to renew and transform the roads thereby acquired and to incorporate the same into a general system; they issued bonds of different series, aggregating millions of dollars upon the entire system and the same have been negotiated for value received and are now held as investors throughout the country; they paid the taxes and public charges as owners of the property. In these and divers other ways, unnecessary to refer to, the defendant, The Rio Grande Western Railway Company and its predecessor, have for fully 19 years advised the world that they claimed to be the absolute owners of the property now in question.

Such being the case the complainant would be barred by the statute of limitations of the State of Utah as found in sections 2859, 2861 and 2865 R. S. of Utah as well as by the equitable doctrine of laches from now prosecuting his present action, even if there had been irregularities or fraud as complained of in the bill.

Of course there is an exception to this general statement, and that is: if the defendant railway company or its predecessor had been guilty of and had so concealed the fraud or fraudulent acts relied upon for relief, that the complainant by the exercise of reasonable diligence could not have discovered their existence, the running of the statute would have been arrested and laches
784 could not have been imputed to complainant during the period of such concealment. But this exception would not have aided the complainant, even if fraud had been practiced by defendant railway company or its predecessor. Of the 579 bonds owned by the complainant, he purchased 355 directly from Charles W. Schofield, who was president of the new Wasatch Railway Com-

pany and one of the trustees in the mortgage of the Bingham road and the proof shows that he actively assisted the complainant in securing the balance of his purchase.

If there were any frauds Schofield knew all about them. The proof shows that he was active in all the transactions of 1879 and 1881, and it also shows that he was in a position to know and might have known all that occurred and I am fully pursuaded that he did know all.

Such being the case and his knowledge being imputable to complainant, the delay in instituting this suit would have been fatal, even if the frauds alleged in the bill had been practiced and participated in and concealed by defendant Rio Grande Western Railway Company, or its predecessor, the Denver & Rio Grande Railway Company.

Apt cases are too familiar to counsel to require or even tolerate citation of authorities to the elementary principles just announced.

Complainant avers in the bill, and his counsel argued at the hearing that the Bingham mortgage of 1874 did not embrace 11 & ½ miles of tramway extensions from the western terminal of the Bingham road; that the Denver & Rio Grande Western Railway Company took possession of these extensions at the time it
785 took possession of the balance of the Bingham road under the foreclosure deed; that these extensions were included in the new Wasatch mortgage of 1879 given to secure the issue of bonds of which complainant holds a part, and that as a result thereof complainant holds a first mortgage lien upon such extension and is entitled to a foreclosure thereunder and an accounting for their use and occupancy as against the defendant Rio Grande Western Railway Company.

A careful consideration of the proof fails to show that any such extensions existed in 1881. The old Bingham mortgage conveyed a line or railroad, beginning at Sandy station in Salt Lake county and "extending thence westerly to a point in Bingham cañon in the same county, a distance of 20 miles from the point of beginning."

The mortgage in terms excluded extensions beyond the terminal points just mentioned, and by necessary implication included extensions within such terminal points.

The main line of this road, as and when constructed, extended westerly from Sandy station to Bingham, a distance of 16 & 13/100 miles. A certain tramway was afterwards, in 1875, constructed to accommodate a mine, but this involved an extension of only 2 & ¾ miles and was per force of the mortgage, made subject thereto.

Another short spur seems to have been constructed for a temporary purpose, but it was abandoned in the year 1876.

All other extensions now appearing in connection with the old Bingham road have been constructed by the Denver & Rio Grande Western Railway Company, or by the Rio Grande Western
786 Railway Company, since the purchase made by the former company in 1881.

It results that complainant's claim to a first mortgage on 11 & ½ miles, or any distance of railroad extension is not well founded. All the railroad property of the old Bingham road passed by the foreclosure sale in 1881 to the Denver & Rio Grande Railway Company, and afterwards in 1889 to the defendant, The Rio Grande Western Railway Company.

The foregoing considerations fully dispose of this case against all the pretensions of the complainant. His charge of fraud and concealment by defendant Rio Grande Western Railway Company and its predecessor in title are supported by no proof worthy of serious consideration and if they were his own want of diligence, and that of his predecessor in ownership of the bonds, with full knowledge of all claimed fraud would disentitle him to the relief sought.

There will be a decree dismissing the bill.

Not for publication in Fed. Reporter.

E. B. A.

Filed at Salt Lake City, June 30, 1902.

JERROLD R. LETCHER, *Clerk.*

787 In the Circuit Court of the United States in and for the District of Utah.

NATHANIEL W. RAPHAEL, Complainant,

vs.

WASATCH & JORDAN VALLEY RAILROAD COMPANY, THE RIO Grande Western Railway Company, and Union Trust Company of New York, as Trustee, Defendants.

This cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it was

Ordered, adjudged and decreed, that the bill of complaint herein be and the same is hereby dismissed at complainant's costs, for which let execution issue.

June 5th, 1902.

E. B. ADAMS, *Judge.*

Filed at Salt Lake City, Utah, June 30th, 1902.

JERROLD R. LETCHER, *Clerk.*

788 (A copy of Judge Thomas' opinion was annexed, same will be found on page 727.)

789 Copy.

Letterhead of Parsons, Shepard & Ogden.

NEW YORK, 17*th Sept.*, 1902.

Hon. Charles L. Easton, 229 Broadway, city.

DEAR SIR:

Raphael v. Rio Grande Western Railway Co.

The notice to counsel issued by the United States circuit court a

St. Louis on the 1st inst. states that no cases filed and docketed after October 1st, 1902, will be assigned to be heard at the December, 1902, term at St. Louis unless advanced by special order of the court. We assume that we have no practical means of compelling the complainant to file and docket the case by October 1st, 1902, unless he shall be willing to do so; but we beg to say that we are now prepared to stipulate the case for the December, 1902, term and beg to ask whether you will agree to the stipulation. We beg to point out to you that under the amended rule 3 of the circuit court of appeals of the eighth judicial district, the case will be delayed until the May term at St. Paul and that even then it can be heard only by stipulation; and that if a stipulation be not made, then the cause cannot be tried until the September term at Denver.

We are informed by Mr. Blair from St. Louis that if the cause be on the December calendar at St. Louis, there will not "be the slightest difficulty in the case being heard" at that term.

Yours respectfully,

(S'g'd) PARSONS, SHEPARD & OGDEN.

790 Copy.

Letterhead of Charles Locke Easton.

NEW YORK, *Sept.* 23, 1902.

Messrs. Parsons, Shepard & Ogden, 111 Broadway, New York city.

DEAR SIRS:

Raphael vs. Rio Grande Western Railway Co. et al.

I am in receipt of your favor of the 17th inst. and contents noted. In reply I beg to say that I have sent today to the clerk of the U. S. circuit court of appeals at St. Louis, the appellant's docket fee, docketing the transcript of the record of this case, which will undoubtedly be done on the 25th inst.

I am not prepared to give you a decision at present in regard to stipulating to hear the case in St. Louis. The reason principally is that I am driven for time in the preparation of some very important cases to come up for argument in the Supreme Court at Washington late this fall, and because I prefer to examine the printed record which the clerk at St. Louis will soon furnish counsel before I decide in reference to the proposed stipulation.

Very truly yours,

(S'g'd) CHARLES LOCKE EASTON.

791 Copy.

Letter head of Parsons, Shepard & Ogden.

NEW YORK, *24th Sept.*, 1902.

Hon. Charles L. Easton, 229 Broadway, city.

DEAR SIR:

Raphael v. Rio Grande Western.

We have your letter of the 23rd inst. In order that the case may be heard at St. Louis in December and in order to avoid the delay of the appeal until the Denver term, it is necessary that a stipulation be filed in St. Louis on or before the 1st prox.

We beg to point out that in view of the elaborate argument of the cause in the court below and the exhaustive briefs there submitted by you, it cannot be difficult to be ready for the argument in December. We therefore again respectfully ask for a stipulation which will enable the appeal to be there heard.

Yours truly,

(S'g'd) PARSONS, SHEPARD & OGDEN.

792 Copy.

Letter head of Parsons, Shepard & Ogden.

NEW YORK, *26th Sept.*, 1902.

Hon. Charles L. Easton, 229 Broadway, city.

DEAR SIR:

Raphael v. Wasatch.

We are advised of the docketing of this case at St. Louis and are again advised that a stipulation must be filed on or before October first in order that the case may be heard at the December term and that otherwise the hearing will be delayed for a year.

We must respectfully advise you that in case you decline to so stipulate, we shall understand and at any proper time shall insist to the court, that you wish to keep this litigation open and to prevent its termination.

Yours truly,

(S'g'd) PARSONS, SHEPARD & OGDEN.

793 Copy.

Letter head of Charles Locke Easton.

NEW YORK, *Sept.* 26, 1902.

Messrs. Parsons, Shepard & Ogden, 111 Broadway, New York city.

Raphael v. Wasatch & Jordan V. R. R. et al.

GENTLEMEN: I am in receipt of your favors of yesterday and today, in reference to this case. I cannot consent to sign a stipulation for the reasons I have heretofore given you.

Very truly yours,

(S'g'd) CHARLES LOCKE EASTON.

(Endorsed:) U. S. circuit court, southern district of New York. Nathaniel W. Raphael against Spencer Trask and others. Affidavit. Parsons, Shepard & Ogden, attorneys for defendants, 111 Broadway, New York city. U. S. circuit court, southern district of New York. Filed Oct. 28, 1902, John A. Shields, clerk.

794 United States Circuit Court, Southern District of New York.

NATHANIEL W. RAPHAEL
vs.
SPENCER TRASK ET AL.

On motion of complainant for leave to amend bill and for leave to file supplemental bill.

Charles L. Easton, for complainant.
Edward M. Shepard, for defendants.

COXE, *J.:*

The firm of Spencer Trask & Company is, and during all the time in controversy was, composed of five members, three of them being citizens of the State of New York and two of them being citizens of the State of New Jersey, of which State the complainant is also a citizen. The original bill was filed against all of the members of the firm. The defendants thereafter filed a plea to the jurisdiction alleging the above facts. After full consideration the plea was sustained by Judge Thomas, who directed that an order be entered dismissing the bill. The complainant now asks to amend the bill by dropping the defendants who are citizens of New Jersey so that the suit may proceed against the three remaining defendants who are citizens of New York. If the court be convinced that, as the law is now declared, the amended bill cannot be maintained it should
795 say so *in limine* without putting the parties to the expense and delay of a hearing upon a plea to the amended bill. The decision upon the plea established the following propositions.

First. That the facts whether as stated in the original bill or in the proposed amended bill cannot be regarded as constituting a cause of action ancillary to the foreclosure action pending in Utah, and that upon the facts, which are unquestioned, it is impossible so to consider it.

Second. That all of the members of the firm of Spencer Trask & Company are interested in the fund which complainant seeks to impound, and are necessary parties to the determination of the questions involved.

If the court had been of the opinion that the action could have proceeded without the New Jersey defendants it would not have ordered the dismissal of the bill. The present motions cannot be granted without ignoring the law as thus stated. If the complainant be dissatisfied with the present status of the law his remedy is

by appeal and not by presenting the old facts with new inferences aud conclusions based thereon.

The motions are denied.

(Endorsed:) Circuit court of the United States, southern district of New York.—Nathaniel W. Raphael, *vs.* Spencer Trask, *et al.*—Opinion, Coxe, C. J.—U. S. circuit court, southern district of New York, Filed Oct. 28, 1902, John A. Shields, clerk.

796 At a stated term of the circuit court of the United States, held in and for the southern district of New York, at the United States court house and post office building in the county of New York, on the 7th day of November, 1902.

Present: Hon. Alfred C. Coxe, judge.

NATHANIEL W. RAPHAEL, Complainant,
vs.
SPENCER TRASK, GEORGE FOSTER PEABODY, EDWIN M. BULKLEY, Charles J. Peabody, and Acosta Nichols, Defendants.

An order, dated September 15th, 1902, having been made by the Hon. Alfred C. Coxe, one of the judges of this court, requiring the defendants to show cause why the complainant should not be granted leave to amend his bill of complaint herein, and restraining the defendants from taking any further proceedings in the action until the further order of the court; and a motion having been made by the complainant for leave to file a supplemental bill of complaint against the defendants Spencer Trask, George Foster Peabody and Acosta Nichols, and the said motions coming on to be heard together upon the return day of said order to show cause; upon reading and filing the said order to show cause and the papers therein referred to and upon which the same was granted, and the complainant's notice of motion for leave to file a supplemental bill of com-
797 plaint, and the petition of the complainant, verified the 16th day of October, 1902, on which the same was made; and the affidavit of George Foster Peabody, verified the 20th day of October, 1902; and after hearing Charles L. Easton, Esq., of counsel for the complainant, and Edward M. Shepard, Esq., of counsel for the defendants, on motion of Smith & Harkness, solicitors for the defendants, it is

Ordered that the complainant's motion for leave to file an amended bill of complaint, be and the same hereby is, denied, and the order restraining the defendants from taking any further proceedings in this action be, and the same hereby is, vacated; and it is further

Ordered that the complainant's motion for leave to file a supplemental bill of complaint against the defendants Spencer Trask, George Foster Peabody and Acosta Nichols be, and the same hereby is, in all respects, denied.

ALFRED C. COXE, *U. S. J.*

(Endorsed :) U. S. circuit court, southern district of New York.—Nathaniel W. Raphael *vs.* Spencer Trask and others.—Order.—Smith & Harkness, solicitors for defendants 26 Liberty street, New York city.—Due and timely service of the within proposed order with notice of settlement is hereby admitted this 5th day of November, 1902. Charles L. Easton, solicitor for complainant. U. S. circuit court, southern district of New York, Filed Nov. 7, 1902, John A. Shields, clerk.

798 Circuit Court of the United States, Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant,
ag'st
SPENCER TRASK, GEORGE FOSTER PEABODY, EDWIN M. BULKLEY, Charles J. Peabody, and Acosta Nichols, Defendants.

A final decree having been entered herein on the 15th day of November, 1902, dismissing this suit and the bill of complaint herein,

Now therefore this court in pursuance of the fifth section of the act of Congress, approved March 3d, 1891, and entitled an "Act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," hereby certifies to the Supreme Court of the United States for decision the question of the jurisdiction alone of this court over this cause as follows:

Is this court without jurisdiction of this cause for the reason that the bill of complaint is not ancillary to the suit pending in the United States circuit court for the district of Utah, and because the defendants Edwin M. Bulkley and Charles J. Peabody are citizens of the same State as the complainant, and are necessary parties defendant to this action.

EDWARD B. THOMAS, *U. S. J.*

Nov. 15 1902.

799 [Endorsed :] E. & A. B. 1981 Original. United States circuit court, southern district of New York. Nathaniel W. Raphael, complainant, ag'st Spencer Trask, *et al.* defendants. Certificate of questions as to jurisdiction of the circuit court of the U. S. for the southern district of New York. U. S. circuit court southern district New York. Filed Nov. 17 1902 John A. Shields, clerk.

800 United States Circuit Court, Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant,
ag'st
SPENCER TRASK, GEORGE FOSTER PEABODY, EDWIN M. BULKley, Charles J. Peabody, and Acosta Nichols, Defendants.

The complainant herein feeling himself aggrieved by the decision of said court, and the decree of dismissal of the bill of complaint herein, with costs to the defendants, now comes by his solicitor, and counsel, Charles Locke Easton, Esq., and petitions the said court for an order allowing said complainant to prosecute an appeal from said decree of dismissal to the honorable Supreme Court of the United States, under and according to the laws of Congress and the statutes of the United States, in such cases made and provided, and that an order be made keeping in force the order made by said court on the 1st day of May, 1901, restraining the defendants from paying out or parting with the fund or money for indemnity or special trust, more particularly described in said order; and also that an order be made fixing the amount of security which complainant shall give and furnish upon such appeal, and that upon the giving of such authority all further proceedings in this court be stayed until the determination of said appeal by the said Supreme Court of the United States;

801 And your petitioner will ever pray.

CHARLES LOCKE EASTON,
Solicitor for Complainant.

(Endorsed:) United States circuit court, southern district of New York.—Nathaniel W. Raphael, complainant, *vs.* Spencer Trask, *et al.*—Petition for appeal.—Charles Locke Easton, complainant's solicitor, 229 Broadway, N. Y.—Copy received Nov. 12, 1902, Smith & Harkness.—U. S. circuit court, southern district of New York. Filed Nov. 17, 1902. John A. Shields, clerk.

802 At a stated term of the circuit court of the United States held in and for the southern district of New York, at the United States court house and post office building in the city of New York, on the 15th day of November, 1902.

Present: Hon. Edward B. Thomas, judge.

NATHANIEL W. RAPHAEL, Complainant,
vs.
SPENCER TRASK, GEORGE FOSTER PEABODY, EDWIN M. BULKLEY, Charles J. Peabody, and Acosta Nichols, Defendants.

The complainant having filed his petition for the allowance of an appeal from the decision therein made and entered herein to the Supreme Court of the United States, together with an assignment of errors within due time, and also praying that an order be made keeping in force the order entered herein on the 1st day of May, 1901, by this court, restraining the defendants from paying out or parting with the fund or moneys for indemnity or special trust, more particularly described in said order, and also praying that an order be made fixing the amount of security which said complainant should give and furnish upon said appeal, and that upon the giving and furnishing of said security all further proceedings of this court be suspended and stayed until the settlement of said ap-

peal by the Supreme Court of the United States, and said
803 petition having been this day duly allowed:

Now, therefore, it is ordered that upon said complainant, Nathaniel W. Raphael filing with the clerk of this court a good and sufficient bond in the sum of fifteen hundred dollars to the effect that if the complainant, Nathaniel W. Raphael, and appellant, shall prosecute the said appeal to effect and answer all damages and costs, if he fails to make his appeal good, then the said obligation to be void, else to remain in full force and virtue, the said bond to be approved by the court and that said order staying the paying out of said trust fund be continued in force during the pendency of said appeal, and that all further proceedings in this court be and are hereby suspended and stayed until the determination of said appeal by the said Supreme Court of the United States, and that said bond become also a bond for damages and costs on said appeal.

EDWARD B. THOMAS, *U. S. J.*

(Endorsed:) United States circuit court, southern district of New York.—Nathaniel W. Raphael, complainant, *vs.* Spencer Trask, *et al.*—Order allowing appeal.—Charles Locke Easton, complainant's solicitor, 229 Broadway, N. Y. C.—Copy received. No. 12, 1902, Smith & Harkness.—U. S. circuit court, southern district of New York, Filed Nov. 17, 1902, John A. Shields, clerk.

804 United States Circuit Court, Southern District of New York

NATHANIEL W. RAPHAEL, Complainant,
ag'st
SPENCER TRASK, GEORGE FOSTER PEABODY, EDWIN M. BULKLEY, Charles J. Peabody, and Acosta Nichols, Defendants.

Comes now the complainant and files the following assignment of errors upon which he will rely.

The United States circuit court for the southern district of New York, which entered the decree of dismissal of complainant's bill of complaint in said cause erred as follows:

I. The court erred in entering a decree dismissing complainant's bill of complaint, for want of jurisdiction.

II. The court erred in sustaining the plea interposed by the defendants to said bill of complaint.

III. The court erred in failing to overrule the plea interposed by the defendants to said bill of complaint.

IV. The court erred in holding that complainant's bill of complaint was not ancillary to complainant's suit pending in the United States circuit court for the district of Utah.

V. The court erred in not holding that complainant's bill of complaint was ancillary to complainant's suit pending in the United States circuit court for the district of Utah.

805 VI. The court erred in not dismissing the plea interposed by all of the defendants to said bill of complaint as an in-

sufficient plea on the part of said defendants Spencer Trask, George Foster Peabody and Acosta Nichols.

VII. The court erred in not holding that the "fund" provided for by the defendants arose from the sale in part of shares of the capital stock of the Rio Grande Western Railway Company issued upon that part of the lines of railroad which was the subject matter of complainant's suit in Utah, and that complainant had a right in this action to be subrogated to the rights of the defendants as an indemnity or special trust "fund" on the determination of the Utah suit.

VIII. The court erred in not holding that the defendants were trustees for the complainant with reference to said "fund."

IX. The court erred in holding that under complainant's bill of complaint, the complainant had no right to any relief in reference to said "fund."

X. The court erred in holding that the original bill or the proposed amended bill was not ancillary to the action pending in Utah.

XI. The court erred in not holding that the original bill or the proposed amended bill was ancillary to the action pending in Utah.

XII. The court erred in holding that Edwin M. Bulkley and Charles J. Peabody were indispensable parties as defendants to this action.

806 XIII. The court erred in not holding that Edwin M. Bulkley and Charles J. Peabody were not indispensable parties as defendants to this action, and that the rights of the parties with reference to the "fund" in question could have been litigated and determined by retaining as defendants Spencer Trask, George Foster Peabody and Acosta Nichols, and dismissing this action as to the defendants Edwin M. Bulkley and Charles J. Peabody.

In order that the foregoing assignment of errors may be and appear of record, the complainant presents the same to the court, and prays such disposition be made thereof as in equity and in accordance with the law and the statutes of the United States in such cases made and provided and complainant prays a reversal of the decretal order and decree of dismissal made and entered by said court.

CHARLES LOCKE EASTON,
Solicitor for Complainant.

(Endorsed:) United States circuit court, southern district of New York.—Nathaniel W. Raphael, complainant, *vs.* Spencer Trask *et al.* Complainant's assignment of errors. Charles Locke Easton, solicitor for complainant, 229 Broadway, N. Y. C. U.S. circuit court, southern district of New York, Filed Nov. 17, 1902, John A. Shields, clerk.

807 United States Circuit Court, Southern District of New York.

NATHANIEL W. RAPHAEL, Complainant,
vs.
SPENCER TRASK, GEORGE FOSTER PEABODY, Edwin M. Bulkley, Charles J. Peabody, and Acosta Nichols, Defendants.

Bond for Damages and Costs.

Know all men by these presents, that we, Nathaniel W. Raphael and American Surety Company of New York, are held and firmly bound unto the above-named defendants, Spencer Trask, George Foster Peabody, Edwin M. Bulkley, Charles J. Peabody and Acosta Nichols, in the sum of fifteen hundred dollars ($1500.), to be paid to the said defendants; for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the 17th day of November, in the year of our Lord one thousand nine hundred and two.

Whereas, the complainant herein having filed his petition for the allowance of an appeal from the decision made and entered herein to the Supreme Court of the United States, together with an assignment of errors within due time, and also praying that an order be made keeping in force the order entered herein May 1, 1901, restraining the defendants from paying out or parting with the fund or
808 moneys for indemnity or special trust, more particularly described in said order, and also praying that an order be made fixing the amount of the security which the complainant should furnish upon said appeal, and upon the giving and furnishing of said security, all further proceedings be suspended and stayed, until the settlement of said appeal by the Supreme Court of the United States, this court upon the presentation and filing of said petition made its order on the 15th day of November, 1902, allowing the said petition and continued in force during the pendency of said appeal the order staying the paying out of said trust fund, and suspended and stayed until the determination of said appeal by the Supreme Court of the United States all further proceedings in this court, upon the complainant filing with the clerk of this court an approved bond for damages and costs in the sum aforesaid to the effect hereinafter set forth.

Now, therefore, the condition of this obligation is such, that if the above-named Nathaniel W. Raphael shall prosecute the said appeal to effect and answer all damages and costs if he fails to make his appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

Sealed and delivered and taken and acknowledged, this — day of November, 1902, before me.

AMERICAN SURETY COMPANY OF NEW YORK.
DAVID B. SICKELS, *Vice President.*
[SEAL.] CORTLANDT S. VAN RENSSELAER,
Attorney.

106,729.

809 STATE AND COUNTY OF NEW YORK, ss:

On this 18th day of Nov. 1902, before me personally appeared David B. Sickels, vice president of the American Surety Company

of New York, to me known, who being by me duly sworn, did depose and say that he resided in the city of New York; that he is the vice president of the American Surety Company of New York, the corporation described in and which executed the above instrument; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said corporation do not exceed its assets as ascertained in the manner provided by law. And the said David B. Sickels further said that he was acquainted with Cortlandt S. Van Rensselaer and knew him to be one of the attorneys of said corporation, that the signature of said Cortlandt S. Van Rensselaer subscribed to the said instrument, is in the genuine handwriting of the said Cortlandt S. Van Rensselaer and was thereto subscribed by the like order of the said board of directors, and in the presence of him the said David B. Sickels, vice president.

[SEAL.] K. J. PEIRCEY,
Notary Public, Kings County, No. 5.

Certificate filed in New York county.

At a regular quarterly meeting of the board of trustees of the American Surety Company of New York, held on the 12th day of April, 1893, the following resolution was adopted:

"Resolved, That the president and vice presidents be and they hereby are, and each one of them is authorized and empowered to execute and deliver, and attach the seal of the company to any and all bonds and undertakings for, or on behalf of the company, in its business of guaranteeing the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitting in all actions or proceedings by law allowed; such guarantee, bonds and undertakings, however, to be attested in every instance by the secretary, one of the assistant secretaries, or one of the attorneys."

COUNTY OF NEW YORK, *ss:*

I, Cortlandt S. Van Rensselaer, attorney of the American Surety Company of New York, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolution.

Given under my hand and the seal of the company at the city of New York, this 18th day of Nov., 1902.

[SEAL.] CORTLANDT S. VAN RENSSELAER, *Attorney.*

(Endorsed:) Approved as to form and also as to sufficiency of surety, with reservation, however, to the def't of the right at any time to examine the proper officers of the surety company, under

oath, touching its assets, liabilities and financial condition
811 generally. E. H. Lacombe, U. S. circuit judge.—U. S. circuit court, southern district of New York, Filed Nov. 18,
1902, John A. Shields, clerk.

812 By the Honorable Edward B. Thomas, acting judge of the circuit court of the United States for the southern district of New York, in the second circuit.

To Spencer Trask, George Foster Peabody, Edwin M. Bulkley, Charles J. Peabody, and Acosta Nichols, Greeting:

You are hereby cited and admonished to be and appear before a Supreme Court of the United States at Washington, on the 2nd day of January, 1903, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the southern district of New York wherein Nathaniel W. Raphael is plaintiff and you are defendants to show cause, if any there be, why the decree in said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the borough of Manhattan, in the city of New York, in the district and circuit above named, this 5th day of December, in the year of our Lord one thousand nine hundred and two, and of the Independence of these United States the one hundred and twenty-seventh.

EDWARD B. THOMAS,
District Judge, Acting as Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

(Endorsed:) United States Supreme Court.—Nathaniel W. Raphael, pl'ff *vs.* Spencer Trask, *et al.* def'ts.—Citation.—Charles Locke Easton, solicitor for pl'ff, 229 Broadway N. Y. city.—Copy received Dec. 5, 1902, Smith & Harkness, solicitors for defendant, 26 Liberty street, N. Y. city.—U. S. circuit court, southern district of New York, Filed Dec. 9, 1902, John A. Shields, clerk.

813 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to 812 inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the cause entitled Nathaniel W. Raphael appellant against Spencer Trask, George Foster Peabody, Edwin M. Bulkley, Charles J. Peabody and Acosta Nichols appellees as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 2nd day of March in

the year of our Lord one thousand nine hundred and three and of the Independence of the said United States the one hundred and twenty-seventh.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, *Clerk.*

814 [Endorsed:] United States circuit court of appeals for the second circuit. Nathaniel W. Raphael appellant *vs.* Spencer Trask *et al.* appellees. Transcript of record from the circuit court of the United States for the southern district of New York.

815 United States Supreme Court.

NATHANIEL W. RAPHAEL, Complainant-Appellant,
against
SPENCER TRASK, GEORGE FOSTER PEABODY, Edwin M. Buckley, Charles J. Peabody, and Acosta Nichols, Defendant-Appellees.

626. Oct. Term, 1902.

To Jas. H. McKenney, Esq., clerk Supreme Court of United States.

DEAR SIR: The IV. assignment of errors, filed by appellant in the above entitled cause, is the error on which appellant intends to rely in the prosecution of said appeal.

That error is as follows viz:

"The court erred in holding that complainant's bill of complaint was not ancillary to complainant's suit pending in the United States circuit court for the district of Utah."

Appellant further states that the entire record of said case as filed in your office is necessary for the consideration of said error, except all of Exhibit "C" and all of Exhibit "D" except the affidavit of George Foster Peabody found on pages 297 to 300 in said Exhibit "D."

The appellant insists that it is not necessary to print said Exhibit "C" and only that portion of Exhibit "D" which embraces the said affidavit of George Foster Peabody.

Very truly yours,

CHARLES LOCKE EASTON,
Solicitor and of Counsel for Appellant.

816 To Edward M. Shepard, Esq., of counsel, and Smith & Harkness, solicitors for defendant-appellees, 26 Liberty street, borough of Manhattan, New York city.

DEAR SIRS: Please take notice that I shall file with the clerk of the Supreme Court of the United States on March 5th, 1903, the foregoing notice, in the above entitled action. Dated March 4, 1903.

Very respectfully yours,

CHARLES LOCKE EASTON,
Solicitor and of Counsel for Appellant.

Office and post office address, 229 Broadway, borough of Manhattan, New York city.

Service of a copy of the above notice is this — day of March hereby accepted.

——— ———,

Of Counsel and Solicitors for Defendant-Appellees.

817 UNITED STATES OF AMERICA, *Southern District of New York, City and County of New York,* } *ss:*

Joseph M. Callahan, being duly sworn deposes and says, that he is over the age of 18 years, that he served a copy of the within notice on Edward M. Shepard of counsel and Messrs. Smith & Harkness, solicitors, attorneys for the defendant-appellees, on March 4th, 1903, by leaving a true copy of the same with a person of suitable age and discretion in charge of the office of said attorneys. Deponent further says that he requested admission of service of the same but the person in charge of said office declined to give said admission and stated to deponent that said Edward M. Shepard was in his office at the time, but that he declined to give the acceptance.

JOSEPH M. CALLAHAN.

Sworn to before me this 4th day of March, 1903.

[Seal of Joseph A. Farley, Notary Public, New York Co.]

JOSEPH A. FARLEY,
Notary Public, N. Y. Co.

[Endorsed:] Original U. S. Supreme Court 626—Oct. term 1902 Nathaniel W. Raphael, appellant, ag'st Spencer Trask *et al.* appellees. Notice to the clerk by appellant for portion of the record to print, & proof of service on counsel for appellees Charles Locke Easton, solicitor and of counsel for appellant.

818 [Endorsed:] File No. 18,854. Supreme Court U. S. October term, 1902 Term No. 626. Nathaniel W. Raphael, app't *vs.* Spencer Trask *et al.* Assignment of error and designation by appellant of parts of record to be printed & notice & proof of service. Filed Mar. 7", 1903.

Endorsed on cover: File No. 18854. S. New York C. C. U. S. Term No. 229. Martha Raphael, administratrix of the estate of Nathaniel W. Raphael, appellant, *vs.* Spencer Trask, George Foster Peabody, Edwin M. Bulkley, Charles J. Peabody, and Acosta Nichols. Filed March 5, 1903. File No. 18854.

Supreme Court of the United States

Supreme Court U.S.
FILED
OCT 8 1909
JAMES H. McKENNEY,
Clerk

MARTHA RAPHAEL, Administratrix of the Estate of Nathaniel W. Raphael, deceased,

Appellant,

vs.

SPENCER TRASK, George Foster Peabody, Edwin M. Bulkley, Charles J. Peabody and Acosta Nichols,

Appellees.

October Term, 1909.

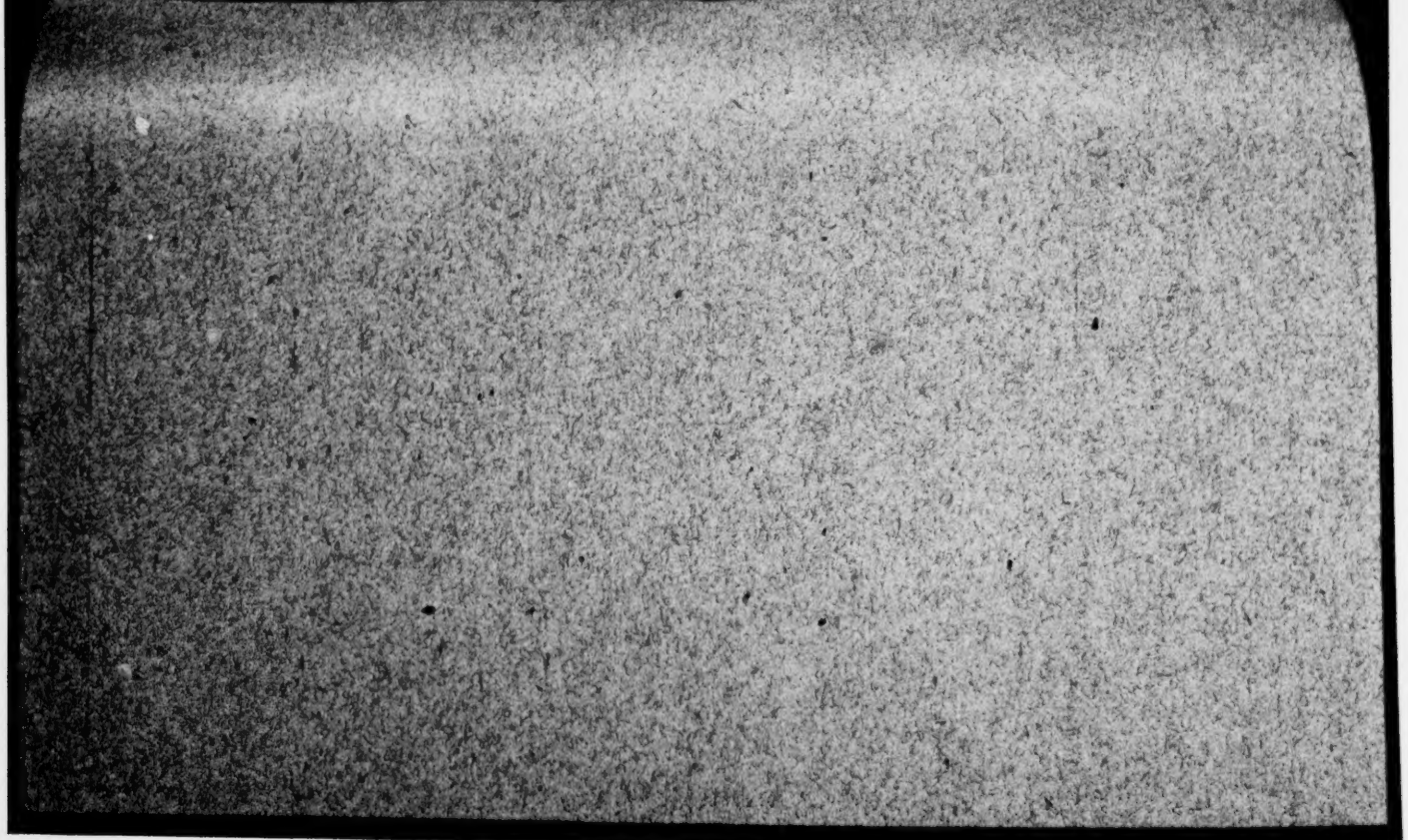
No. 229.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPELLANT'S MOTION, NOTICE OF MOTION, AND STATEMENT TO ADVANCE HEARING UNDER RULE 32.

CHARLES LOCKE EASTON,
Counsel for Appellant.

APPEAL PRINTING CO., 14 VESEY ST. TEL. 192 CORTLANDT.



2120

Supreme Court of the United States.

MARTHA RAPHAEL, Administratrix of the Estate of Nathaniel W. Raphael, deceased, Appellant,	
vs.	October Term, 1903, No. 229.
SPENCER TRASK, George Foster Peabody, Edwin M. Bulkley, Charles J. Peabody and Acosta Nichols, Appellees.	

Appeal from the Circuit Court of the United States for the Southern District of New York.

Comes now the appellant by Charles Locke Easton, her counsel, appearing in that behalf, and moves the Court under Rule 32 to advance the hearing of the appeal in the above-entitled cause because the only question in issue is the question of the jurisdiction of the Court below.

CHARLES LOCKE EASTON,
Counsel for Appellant.

October 12th, 1903.

SUPREME COURT OF THE UNITED STATES.

MARTHA RAPHAEL, Administratrix of the Estate of Nathaniel W. Raphael, deceased,
Appellant,

vs.

SPENCER TRASK, George Foster Peabody, Edwin M. Bulkley, Charles J. Peabody and Acosta Nichols,
Appellees.

To EDWARD M. SHEPARD, ESQ., of Counsel and Messrs. SMITH & HARKNESS, Solicitors for Appellees.

Please take notice that on the 12th day of October, 1903, at the opening of the Court, or as soon thereafter as counsel can be heard, the motion of which the foregoing are copies, will be submitted to the Supreme Court of the United States for the decision of the Court thereon.

Annexed hereto is a copy of a statement to be submitted with the said motions in support thereof.

CHARLES LOCKE EASTON,
Counsel for the Appellant.

New York City, October 1st, 1903.

SUPREME COURT OF THE UNITED STATES.

MARTHA RAPHAEL, Administratrix of the Estate of Nathaniel W. Raphael, deceased,
Appellant,

vs.

SPENCER TRASK, George Foster Peabody, Edwin M. Bulkley, Charles J. Peabody and Acosta Nichols,
Appellees.

Statement.

The Justice who heard this cause, in the Court below, has certified (Printed Transcript, page 121), to this Court in pursuance of the 5th Section of the "Act of Congress, approved March 3d, 1891, entitled an "Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes"—that the only question in issue is the question of the jurisdiction of the said Court below.

1902, November 15th, the Court below sustained the plea of the defendant's (appellee's) (Printed Transcript page 94), to the jurisdiction of the Court below, and dismissed plaintiff's (appellants) bill of complaint, and on the same day the Court below entered an order (page 122) allowing appellant's appeal to this Court.

1902, December 15th, solicitor's for defendants accepted service (page 127), (Printed transcript) of citation.

1903, March 5th, appellant filed the transcript of the record in this Court.

1903, September 23d, printed copy of the record of this appeal received by appellant's solicitors from the Clerk of this Court.

Appellant therefore, asks this Court, at the earliest time possible, in pursuance of Rule 32 of this Court, to have the hearing of this appeal advanced on the calendar of this Term of Court.

Respectfully submitted,
CHARLES LOCKE EASTON,
Counsel for Appellant.

[1703]

Supreme Court of the United States.

MARTHA RAPHAEL, Administratrix of the estate of Nathaniel W. Raphael, deceased, Appellant, AGAINST SPENCER TRASK, GEORGE FOSTER PEABODY, EDWIN M. BULKLEY, CHARLES J. PEABODY and ACOSTA NICHOLS, Appellees.	October Term, 1903. No. 229.

Appeal from the Circuit Court of the United States for the Southern District of New York.

APPELLANT'S BRIEF AND ARGUMENT.

April 30, 1901, Nathaniel W. Raphael in his life time, since deceased, as a citizen of the State of New Jersey, on his own behalf and on behalf of certain other bondholders hereinafter described, filed a bill of complaint in the court below against the appellees as citizens of the Southern District of New York (P. R., 1 to 9).

In that bill of complaint it is alleged that the said Raphael on the 7th January, 1901, had filed a certain bill of complaint in the United States Circuit Court for the District of Utah, against the Rio

Grande Western Railway Co. and others to foreclose certain second mortgage bonds of the Wasatch and Jordan Valley Railroad Company, secured upon the Bingham and Alta Spurs of that portion of said railway company. A copy of the Utah bill (P. R,, 17 to 41) is annexed and made a part of the bill of complaint in the court below. The prayer of the Utah bill is for a redemption from the foreclosure sale of two certain underlying mortgages upon said spurs, which had been illegally foreclosed in 1881, and under which sale the said Rio Grande Western Company had entered into possession of that part of said road in controversy, and for a foreclosure of said second mortgage bonds. The Utah bill alleged that the mortgaged property was inadequate security for the payment of said second mortgage bonds, and that said Rio Grande Western Company had received enough net earnings since it went into possession of these spurs, from the operation of the mortgaged portion of the road in question, to more than pay off said underlying mortgages, and had on hand out of the net earnings of the mortgaged road over $800,000 applicable to the payment of said second mortgage bonds. The Utah bill alleged that there are $884,000 of said second mortgage bonds ontstanding, and that the complainant, Raphael, is the owner of 579 of said second mortgage bonds, and that there is due of interest on said 579 bonds the sum of $825,976.83, a total of principal and interest of $1,404,970.83.

The bill of complaint in the court below further alleges that the appellees composing the firm of Spencer Trask & Company, carrying on business as bankers in the City of New York, caused to be published an advertisement in the *New York Herald* of April 2, 1901, in which it is stated that:

"Since the commencement of the negotiations one Raphael has instituted in the United States Circuit Court for Utah a suit against the title of the Western Company, to the Bingham and Alta spurs of its railroad; and in making the contract

for the vendors our firm gave its personal guarantee against any liability of the company in that suit. Although the company's solicitors are confident of success it is proper that our guarantee be ratably shared by all who avail themselves of the contract made by us for the vendors. From the eighty dollars per share and interest mentioned above we shall therefore deduct such amount per share as counsel shall advise us will amply protect us from such guarantee. *Such amount will be held in a special trust.*"

The bill of complaint in the court below further alleges that in the same issue of the *New York Herald*, as the above advertisement, there appeared also an advertisement published by the Denver and Rio Grande Railroad Company for a meeting of its stockholders, to vote upon a proposition to purchase the stock, referred to in the advertisement of Spencer Trask & Co., of the Rio Grande and Western Railway Company.

The bill of complaint in the court below also further alleged that the said appellee, George Foster Peabody, in an affidavit used by appellees in opposition to the motion of Mr. Raphael, as complainant in the Utah suit, for the appointment of a receiver of the railroad in controversy in the Utah suit (P. R., 73), stated, viz.:

"The result of this provision is that if the complainant have any just claim, its payment is secured not only by the great excess of the assets of the Rio Grande Western Railway Company itself, over its debts, but also by a special amount *to be held in trust.*"

The bill in the court below further alleges that the suit in Utah is at issue and still pending and undetermined.

April 30, 1901, on filing of the bill of complaint in the court below, the Court ordered appellees to show cause by May 1, 1901, why a preliminary injunction should not issue restraining the appellees from selling and delivering the said shares of the Rio Grande

Western Company, and in the meantime be staid from selling and delivering said shares until the further order of the Court (P. R., 10).

May 1, 1901, on the hearing of the return of the said order to show cause, the appellees appeared specially by counsel *to object to the jurisdiction of the Court* and to sustain their contention in that regard filed affidavits of the appellees Edwin M. Bulkley and Charles J. Peabody asserting that they were not citizens of the Southern District of New York, but were citizens of the State of New Jersey (P. R., 10 and 15), the same State as complainant Raphael.

George Foster Peabody, in his affidavit, stated he was not a citizen of the Southern District of New York but was a citizen of the Eastern District of New York (P. R., 14).

Spencer Trask, in his affidavit, stated he was not a citizen of the Southern District of New York but was a citizen of the Northern District of New York (P. R., 15).

Acosta Nichols, in his affidavit (P. R., 16), admitted that he was a citizen and resident of the Southern District of New York.

All of the appellees admitted in said affidavits that they were members of the firm of Spencer Trask & Co., and were carrying on business as bankers in the said Southern District of New York.

Thereupon his Honor, Addison Brown, District Judge, sitting as United States Circuit Judge, made the following order that appellees be—

"enjoined until the further order of the Court (P. R., 87), from paying out or parting with the fund or moneys for indemnity to them or *special trust* which shall come to be or be in their hands or under their control, pursuant to their advertisement bearing date the 2d day of April, 1901, thereafter published addressed to the 'Stockholders of the Rio Grande Western Company,' a copy of which is set forth in the complainant's moving papers."

June 10, 1901 (P. R., 88) the subpœna issued against the defendants on filing the bill of complaint in the court below were served upon all the appellees by the United States Marshal in the Southern District of New York.

July 1, 1901, the appellees filed a plea (P. R., 89) in bar to the bill of complaint in the court below, averring that the plaintiff, said Raphael, and the said appellees, Edwin M. Bulkley and Charles J. Peabody, were both citizens of the State of New Jersey, and that therefore none of the appellees were bound to make answer to the bill of complaint filed against them in the court below.

August 29, 1902, the said plea to the jurisdiction having been heard before his Honor Edward B. Thomas, District Judge of the Eastern District of New York, sitting as Circuit Judge for the Southern District of New York, filed his written opinion sustaining the said plea to the jurisdiction (P. R., 91-94), and authorized a dismissal of the bill of complaint filed in the court below.

September 15, 1902, no order having been entered dismissing the said bill of complaint in the court below, the complainant, Mr. Raphael, made application before his Honor Alfred C. Coxe, United States Circuit Judge for the Southern District of New York, who granted an order (P. R., 95, 96) directing the appellees to show cause by October 20, 1902, why the said complainant Raphael should not have leave to amend his said bill of complaint to which said plea had been sustained in the court below.

The proposed amendments to said bill of complaint (P. R., 102, 107) offered to dismiss as to the appellees Edwin M. Bulkley and Charles J. Peabody, claiming to be citizens of the State of New Jersey, and alleging that said appellees are only junior members of the banking firm of Spencer Trask & Co.; that the principal members of said firm are Spencer Trask and George Foster Peabody, the appellees, and that there is no intention of holding any members of the said firm personally on any money

judgment; that the only object of the suit is to subject the said fund to the control of the Court pending the suit in Utah, and that it is believed the rights of the said Raphael as complainant and all the interests of the appellees as members of said firm can be litigated and determined in an action against the remaining appellees, Spencer Trask, George Foster Peabody and Acosta Nichols, without joining as defendants the said non-residents Edwin M. Bulkley and Charles J. Peabody.

The proposed amendments to the said bill also alleged that the said Denver and Rio Grande Railroad Company, which sought to take over the said shares of the capital stock of the Rio Grande Western Railroad Company, referred to in said advertisement, had never paid any dividend upon its common stock and had only paid four per cent. per annum upon its preferred stock; while the Rio Grande Western Railway Company's net earnings per mile of road owned and operated for the year 1900 is $644 greater than the Denver and Rio Grande Railroad; and that the real object of the proposed purchase of the Utah Road by the Colorado Road is to enable the surplus earnings of the Utah road to be acquired for the purpose of making up the deficiency of earnings of the Colorado road.

The proposed amendments to the said bill further allege that the Missouri Pacific Railroad which makes connection with the said Colorado Road at Pueblo, in the State of Colorado, intends to acquire the Colorado Road immediately after the Colorado Road has acquired the Utah Road, and that the scheme was then to substitute for the directors of the Utah and Colorado Road the same directors of the Missouri Pacific roads so acquired shall become a part and parcel of the Missouri and Pacific Railway system.

The proposed amendments further set forth (P. R., 104), that the owners of the shares of the capital stock of the Rio Grande Western, out of which said fund was allowed to be created, agreed with the

said appellees that the said fund should be created for the purpose of paying out of said fund the amount which might be found to be due complainant on his said bonds in case he succeeded in his Utah suit.

Said proposed amendments further state that the said firm of Spencer Trask & Co. were the fiscal agents of the Rio Grande Western Company, and were such at the time the bill was filed in the Utah suit, and that said appellees knew of the filing of the bill of complaint in the Utah suit, and that at the time the said fund was agreed to be created the appellees knew that said fund was agreed should be used to pay any deficiency judgment which the said Raphael, as complainant, might obtain in the Utah suit.

The proposed amendments (P. R., 105) further state that the mortgaged road in litigation in the Utah suit produces greater earnings per mile of road of the said Rio Grande Western Railway Company than any portion of that road; that it is situated in the Western mountains of the Jordan Valley in Utah, in the great copper and other mining regions of that locality, and that the representatives of the Colorado Road, the proposed purchaser of the Utah Road, agreed with the appellees as a condition of purchase of said shares of the Utah Road that these spurs should not be foreclosed under the foreclosure proceedings in the Raphael suit in Utah, but that if Mr. Raphael succeeded in his said Utah suit, said fund should be used in liquidating Mr. Raphael's said claim without a foreclosure of said spurs.

The proposed amendments further state (P. R., 105), that a greater portion of said 90 per cent. of stock of the Rio Grande Western Company, referred to in said advertisement of Spencer Trask & Co., was owned by the Rio Grande Western Construction Company, a corporation which built the Rio Grande Western Railroad Company, and a portion were owned by the said appellees, George Foster Peabody and Spencer Trask, and portion were owned

by one William J. Palmer, who at that time was the president of the Rio Grande Western Railroad Company and who had been such president ever since that road was built, and also a portion owned by the firm of Spencer Trask & Co., and all of whom were in turn the owners of a majority of the capital stock of said Construction Company, and that it was by the consent of said Construction Company, said William J. Palmer, George Foster Peabody and Spencer Trask that the said fund should be created to be used as a fund to pay off complainant's claim when established in the Utah suit.

October 20, 1902, at the hearing of the order to show cause before Judge Cox as to why Mr. Raphael, as said complainant, should not be allowed to amend his said bill of complaint as above, Mr. Raphael presented his verified petition (P. R., 96 to 99) for leave to file a supplemental bill, setting forth that since the filing of said original bill, in the Court below (P. R., 98), the moneys realized from the sale of the said shares of the Rio Grande Western Company to the Denver and Rio Grande Railway Company, has been set aside by the appellees, as a *special trust*, and that the said fund is now in possession and control of the appellees, and that in pursuance of the original scheme as set forth in the original bill in the court below, the Missouri Pacific Railroad has purchased a controlling interest in all the shares of the capital stock of the said Utah Road and said Colorado Road, and that the Missouri Pacific Railway Company, has the same set of directors in the Utah Road, and the Colorado Road, as in the Missouri Pacific Road, and that the same officers of the Missouri Pacific Road, are the same officers governing and managing the said Colorado and said Utah Road.

The prayer of the supplemental bill (P. R., 98) is that the said fund be turned over to a receiver or trustee to be selected by the Court, and that in case Mr. Raphael, the said complainant, should succeed

in the Utah suit, that the said fund be applied towards the payment of any deficiency judgment which the complainant may sustain in the foreclosure and sale of those spurs of the Utah Road, and for such other relief as may be necessary and proper.

October 28, 1902, Judge Cox filed an opinion (P. R., 119–120), and on the 7th day of November, 1902, made an order denying said motion for leave to amend said bill of complaint filed in the Court below, and denied said motion to file a supplemental bill of complaint (P. R., 120).

November 15, 1902, Judge Thomas entered an order (P. R., 94, 95) sustaining appellee's plea to the jurisdiction, and dismissing the bill of complaint filed in the Court below, and vacating the said restraining order issued by Judge Brown of May 1, 1901, prohibiting the appellees from paying out or parting with the funds or moneys for indemnity or *special trust.*

November 17, 1902, Mr. Raphael having perfected an appeal to this Court from the order dismissing the bill of complaint in the Court below, made the following (P. R., 123–124):

Assignment of Errors.

I.—The Court erred in entering a decree dismissing complainant's bill of complaint for want of jurisdiction.

II.—The Court erred in sustaining the plea interposed by the defendants to said bill of complaint.

III.—The Court erred in failing to overrule the plea interposed by the defendants to said bill of complaint.

IV.—The Court erred in holding that complainant's bill of complaint was not ancillary to complainant's suit pending in the United States Circuit Court for the District of Utah.

V.—The Court erred in not holding that complainant's bill of complaint was ancillary to complain-

ant's suit pending in the United States Circuit Court for the District of Utah.

VI.—The Court erred in not dismissing the plea interposed by all of the defendants to said bill of complaint as an insufficient plea on the part of said defendants Spencer Trask, Foster Peabody and Acosta Nichols.

VII.—The Court erred in not holding that the "fund" provided for by the defendants arose from the sale in part of shares of the capital stock of the Rio Grande Western Railway Company issued upon that part of the lines of railroad which was the subject matter of complainant's suit in Utah, and that complainant had a right in this action to be subrogated to the rights of the defendants as an indemnity or special trust "fund" on the determination of the Utah suit.

VIII.—The Court erred in not holding that the defendants were trustees for the complainant with reference to said "fund."

IX.—The Court erred in holding that under complainant's bill of complaint the complainant had no right to any relief in reference to said "fund."

X.—The Court erred in holding that the original bill or the proposed amended bill was not ancillary to the action pending in Utah.

XI.—The Court erred in not holding that the original bill or the proposed amended bill was ancillary to the action pending in Utah.

XII.—The Court erred in holding that Edwin M. Bulkley and Charles J. Peabody were indispensable parties as defendants to this action.

XIII.—The Court erred in not holding that Edwin M. Bulkley and Charles J. Peabody were not indispensable parties as defendants to this action, and that the rights of the parties with reference to the "fund" in question could have been litigated and determined by retaining as defendants Spencer Trask, George Foster Peabody and Acosta Nichols, and dismissing the action as to the defendants Edwin M. Bulkley and Charles J. Peabody.

Nathaniel W. Raphael died after perfecting this appeal, and his administratrix was substituted as appellant.

POINTS.

POINT I.

The bill in the Court below is brought to stay waste, and for general relief.

The bill in the Utah suit alleges that the mortgaged property is inadequate security for the mortgaged debt.

The bill in the Court below alleges that the published notices show an intention to pass the title of the Rio Grande Western to the Denver and Rio Grande.

The proposed amendments to the bill of complaint, in the Court below, allege that the Colorado Road has never paid any dividends on its common stock and only a four per cent. annual dividend upon its preferred stock, and that the object of the purchase of the Utah Road by the Colorado Road, is for the purpose of using the surplus earnings of the Utah Road to make up the deficiency of earnings of the Colorado Road, and that such change of title would hinder and delay the collection of complainant's claim in his Utah suit.

A bill to restrain waste is allowed where waste is apprehended, because the whole estate is a security for the mortgage indebtedness, not only embracing the railroad property, but the surplus income, and the net earnings covered by the terms of the mortgage.

The complainant is entitled to have the mortgaged property come to him, if he succeeds in the Utah suit, in the same condition in which it was at the time the Utah suit was commenced.

The bill in the Utah suit alleges that there is over $800,000 of net earnings of the Rio Grande Western, coming from the mortgaged property applicable to complainant's claim, and that there is a well

grounded apprehension of waste of that surplus if the sale of the shares is allowed to be carried out.

Chancery goes to great length in staying waste. It is a wholesome jurisdiction to be liberally exercised in the prevention of irreparable injury.

The Chancellor in Equity says to these appellees in the case at bar, you have no right to put beyond the control of the complainant these $800,000 of net earnings of the Rio Grande Western, which have come from the mortgaged property in question, without first obtaining complainant's consent; you must make a bargain with complainant if you wish the sale of the shares to go through, by creating a "fund" out of the sale of these shares, so that the complainant's claim can be paid in case he succeeds in the Utah suit.

This is what the appellees consented to do when they say, in that advertisement, that:

"Since the commencement of the negotiation one Raphael has instituted in the United States Circuit Court for Utah a suit against the title of the Western Company to the Bingham and Alta Spurs of its railroad; and in making the contract for the vendors, our firm gave its personal guarantee against any liability of the company in that suit." * * * "From the $80 per share and interest mentioned above we shall therefore deduct such amount per share as counsel shall advise us will amply protect us upon such guarantee. *Such amount will be held in a special trust.*"

And as a further evidence of such a bargain the appellee, George Foster Peabody, says in his affidavit:

"The result of this provision is that if the complainant have any just claim, its payment is secured not only by the great excess of the assets of the Rio Grande Western Company itself over its debts, *but also by a special amount to be held in trust*, * * * as it gives a greater assurance that, *if the complainant's claim shall be established, it will be paid.*"

Lanier v. *Allison*, 31 Fed. Rep., 100.

Smith v. *City Council of Rome*, 19 Ga., 89.

Griffin v. *Sketoe*, 30 Ga., 300.
Markham v. *Hall*, 33 Ga., 508.
Marshall v. *Turnbull*, 32 Fed. Rep., 124.
High on Injunction, first edition (Sec. 4-257, 262, 421, 458).

Where irremediable mischief going to the destruction of the substance of the estate is being done by the person in possession to an estate in litigation at law, an injunction will be issued to them.
Erhardt v. *Boaro*, 113 U. S., 537.

Judge Speer, in the case of Lanier *v.* Allison, in U. S. Circuit Court, Eastern District of Georgia, June 4, 1887, 31 Fed. Rep., 102, in rendering the opinion of the Court, says:

"This is a bill for an account, and to restrain waste; and Lord Eldon is reported to have said that 'if the plaintiff filed a bill for an account, and an injunction to restrain waste, stating that the defendant claimed by a title adverse to his, he stated himself out of court as to the injunction.' This doctrine has been greatly modified in modern times, and it is now a common practice, is cases where irremediable mischief is being done *or threatened*, going to the destruction of the estate, * * * to issue an injunction, though the title to the premises be in litigation. The authority of the Court is exercised in such cases, through its preventive writ, to preserve the property from destruction pending legal proceedings for the determination of the title."

Justice Field, in the case of Ehrardt *v.* Boaro, 113 U. S., 537, in rendering the opinion of the Court, says:

"This is a suit in equity ancillary to the action for the possession of the mining claim just decided. It is brought to restrain the commission of

waste by the defendant, pending the action. The bill prays for a writ of injunction restraining the defendants from mining on the claim, or extracting ore therefrom, or removing any ore already extracted, until the final determination of the action at law. * * * The Court granted a preliminary injunction, but after the trial of the action at law, judgment being rendered therein in favor of the defendants, it dissolved the injunction and dismissed the bill. From the decree of the Court the case is brought here by appeal (here follows the language quoted above in Lanier *v.* Allison, *supra*). As the judgment in the action at law in favor of the defendants has been reversed, and a new trial ordered, the reason which originally existed for the injunction continues. The decree of the Court below must, therefore, be reversed, and the cause remanded, with directions to restore the injunction until the final determination of that action; and it is so ordered."

Judge Lacombe, in the case of Marshall *v.* Turnbull, in the United States Circuit Court for the Eastern District of New York, August 10, 1887, in rendering the opinion of the Court (32 Fed. Rep., 125), says:

"This is an application for a preliminary injunction to restrain defendants George Turnbull and the Pederrale's Company, their agents, associates, servants, &c., from committing any injury upon a certain tract of land in the delta of Orinoco, or doing any other act to the prejudice of the complainant, who is the holder of certain bonds which said tract of land is mortgaged to secure. The defendant Turnbull raises a preliminary objection, viz., that the Court has no jurisdiction of the action, the bill being for the foreclosure of a mortgage on lands situated in a foreign country. The question of jurisdiction need not be considered at this stage of the proceedings so far only as it is

is germane to the matter now before the Court. The particular relief prayed for in the bill, and which the Court is now asked to extend to complainant, is concededly within the power of this Court. A defendant properly served, may be enjoined from committing waste upon, *or otherwise impairing the value of property in which the complainant is interested*, even though the property is located abroad, provided a case for the interposition of a court of equity is made out."

The bill in the Court below is filed for the double purpose of preventing waste of the suplus earnings of the mortgaged premises in the Utah suit, or restraining the parting with or paying out of said trust fund until sale of the shares of the capital stock of the Utah Road to Colorado Road.

The objection to the jurisdiction admits that if the Court had jurisdiction the allegations of the bill as to prospective injuries are true.

High on Injunctions, Sec. 4, says:

"The sole object of an interlocutory injunction is to *preserve the subject in controversy, in its then condition, and without determining any question of right*, merely to prevent the further perpetration of wrong or the doing of any act whereby *the right* in controversy may be injured or endangered * * *. The jurisdiction, therefore, being exercised to prevent the further continuance of injurious acts, rather than to undo what has already been done, on an interlocutory application for an injunction courts of equity will only act prospectively, and will interpose only such restraint as may suffice to stop the mischief complained of and preserve matters in *statu quo*.

Sec. 5. "And in order to sustain an injunction for the protection of property *pendente lite* it is not necessary to decide in favor of the plaintiff upon the merits, nor is it necessary that he should present such a case that will certainly entitle him to a decree upon the final hearing, since he may

be entitled to an interlocutory injunction, although his rights to the relief prayed may ultimately fail."

Sec. 262. "The owner of farming lands, who has a mortgage upon the stock and utensils of his tenant, as well as upon the interest of the tenant in the crops being raised thereon, has been allowed an injunction to prevent a sale under execution against the tenant of equity in the property thus mortgaged, the relief being extended upon the ground of irreparable injury and the difficulty of estimating the damages at law which would result from permitting the sale."

POINT II.

The appellees having voluntarily offered protection to the complainant on account of threatened waste by the creatiou of a fund in case the complainant succeeds in his Utah suit, it was error to dismiss the bill of complaint as there was no *mala fides* manifest.

POINT III.

One federal Circuit Court has an inherent ancillary jurisdiction to hear and determine all petitions for relief presented to it in respect of the property over which another federal Circuit Court has already acquired primary jurisdiction.

If a threatened waste of the mortgaged property under foreclosure in the primary action is appre-

hended, the mortgagor is not compelled to wait the uncertain delays of the foreclosure suit in the primary action before taking steps to assert his rights. He may proceed against the threatened waste by an ancilliary suit.

POINT IV.

Equity Rule 57 provides that if the suit shall become defective by reason of the happening of an event after the filing of the bill, it is the duty of the party desiring to take advantage of such an event and seek to have a supplemental bill or other pleading filed in the cause, to move the Court without unnecessary delay after the knowledge of such an event shall have come to such moving party.

Jons Rules of Practice, Equity Rules 57 and 58.
Notes and Decisions.
Daniell's Chancery Practice, 779 *et seq.*; *Id.*, 1515 *et seq.*
Mitford & Tyler's Pleadings E. Pr. in Equity, Chap. 4, pp. 158, 172.
Kennedy v. *Bank of Georgia*, 8 How., 586.
Sneed vs. *McCoul*, 12 How., 407.
Shaw vs. *Bell*, 95 U. S., 10.
Chester v. *Life Assn. of America*, 4 Fed. R., 487.
Mosgrove vs. *Coons*, 14 Fed. R., 317.

Under Equity Rule 35 (P. 1260, Foster's Fed. P., Vol. 2) the Court in its discretion, upon motion of the plaintiff after a demurrer or plea is allowed, to

grant the plaintiff leave to amend so as to cure the defects sustained, as in the case at bar, viz.:

1. Amend by striking out the names of the appellees residing in the State of New Jersey.

2. By showing that Spencer Trask & Company were the financial agents of the Rio Grande Western and that the "fund" was created for the purpose on the part of the sellers of the stock to enable the claim of the appellant, the plaintiff in the court below, to have his claim paid, in case he succeeded in the Utah suit and to prevent a foreclosure.

This the appellant offered to do and tendered to the Court the amendments so that the litigation would be only between a citizen of New Jersey and the three remaining members of the firm of Spencer Trask & Company; Spencer Trask, George Foster Peabody and Acosta Nichols.

(*A.*) Parties with the naked, legal title having no interest in the controversy—as trustees—can always be omitted as defendants (Simms *vs.* Guthrie, 9, Cranz, 19).

Boon's Heirs *vs.* Chiles, 8 Pet., 689.
Union Bank *vs.* Stafford, 12 How., 327.
New Orleans Canal, Etc., *vs.* Stafford, 12 How., 343.
Waldon *v.* Skinner, 101 U. S., 577.
Bacon *v.* Rives, 106 U. S., 99.

(*B*). In a suit against a firm by strangers, a partner beyond the jurisdiction may be omitted if no injustice will be done him by a decree in his absence.

Voss v. *Philbrook*, 3 Story, C. C., 335.
O'Harar v. *McConnell*, 93 U. S., 150.
Thayer v. *Life Association*, 112 U. S., 717.
American Bible Society v. *Price*, 110 U. S., 61.

In England, it has been held in accordance with a *maxim de minimus non cural lex* that when the interest of the absent person is evidently very small the Court will dispense with his presence in the suit.

Mechanics' Bank v. *Seton*, 1 Pet., 299.

(*C.*) Relaxation as to the rule as to parties in special cases.

Caldwell v. *Taggart*, 4 Pet., 190.
Robertson v. *Carson*, 19 Wall., 94.
Hoe vs. *Wilson*, 9 Wall., 501
Railroad Company vs. *Orr*, 18 Wall., 471.
U. S. vs. *Union Pacific R. R.*, 98 U. S., 569.
Sec. 50 Foster's Fed. Pr., p. 123.

(*D.*) Justice Swayne in delivering the opinion of the court in the case of *May* vs. *Le Claire, 11 Wall., 236*, says: "Equity sometimes takes jurisdiction on account of the parties and sometimes on account of the relief proper to be administered. The same considerations which invoke the jurisdiction may control the remedy." Judge Sanborn in rendering the opinion of the court in the case of *Sioux City Terminal R. R.* vs. *Trust Company of North America, 82 Fed. R., 126*, says: "An indispensable party is one who has such an interest in the subject matter of the controversy that a final decree between the parties before the court, cannot be made without affecting his interests, or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience."

Justice Field in delivering the opinion of the Court in the case of *Horn* vs. *Lackhart, 17 Wall., 579*, says:

"The objection to the jurisdiction of the Court that two of the defendants were residents of Texas, the same State with the complainants, was met and

obviated by the dismissal of the suit as to them. They were not indispensable parties; that is, their interests were not interests interwoven and bound up with those of the complainants or other parties, that no decree could be made without necessarily affecting them, and it was only the presence of parties thus situated which was essential to the jurisdiction of the Court. The rights of the parties other than the defendants who were citizens of Texas could be and were adequately and fully determined, without prejudice to those defendants. And the question always is or should be when objection is taken to the jurisdiction of the Court by reason of the citizenship of some of the parties, whether to a decree authorized by the case presented they are indispensable parties, for if their interests are severable and a decree without prejudice to their rights can be made, the jurisdiction of the Court should be retained and the suit dismissed as to them."

(*E.*) *On a bill to enforce a mortgage given to trustees where a majority of the trustees are parties, the other trustee is not necessary.*

Stewart vs. *Chesapeake & Ohio Can. Company*, 1 Fed. Rep., 361.
Mechanics' Bank v. *Seton*, 1 Pet., 299.

(*F.*) *If the defendant has a distinct interest and substantial justice can be done, jurisdiction attaches as to him alone.*

Cameron v. *McRobert*, 3 Wheaton, 591.
Nesmith v. *Cadberg*, 1 Wood and M., 34.

(*G.*) *A defendant who has a severable interest by making him a defendant would deprive the court of jurisdiction of the suit the bill should be dismissed as to him.*

Corn v. *Lockhart*, *supra*.

(*H.*) *Amendments thus allowed to affect the jurisdiction relate back and become a part of the original bill.*

Gaylor v. *R. R. Co.*, 6 Biss., 287.
Fed. Case, 52, 84.

(*I.*) *Amendments can be allowed to the pleadings for the purpose of more fully presenting the facts at issue between the parties even after a reversal by the Supreme Court of the decree. In re vs.* Sandford Fork & Tool Company, 160 U. S., 247, a defect of parties may be cured by amendments.

Douglass v. *Butler*, 6 Fed. Rep., 228, or by striking out parties.
Connolly v. *Taylor*, 2 Pet., 556.
Cole v. *S. M. Coe* vs. Virginia G. H. W. Co, 1 Saw., 470 Fed. Case, 2989. Striking out defendant.
Greeley v. *Smith*, 3 Story; 76 Fed. Cas., 5747.

If a declaration fails to allege the matter in controversy it may be amended.

Laming v. *Dalph*, 4 Wash. C. C., 624; Fed. Case, 8073.

(*J.*) *Equity rule 35 is passed upon when the amendments which are desired to be made are shown.* (*p. 22*).

National Bank v. *Carpenter*, 101 U. S., 567.

Plaintiff may show a subsequent capacity to sue after demurrer is sustained.

Swatzee v. *Arnold*, 1 Wool., 483; Fed. Case, 13,682.

(*K.*) *Where a new cause of action is intended by amendment it may be allowed when it corresponds with the original bill.*

U. S. vs. *Distilled Spirits*, 1 Abb. U. S., 573; Fed. Case 15,943.

(*L*) *An amendment which changed even the character of the bill was allowed in a special case, even after final decree.*

Tremolo patent, 23 Wall., 518.

In the case of *Howe* v. *Jameson*, *166 U. S., 395*, the suit was brought by citizens of the District of Columbia in the United States Circuit Court for the District of Wisconsin against citizens of the State of Wisconsin; the defendants, moved to dismiss the action unless the plaintiffs should within five days thereafter so amend their complaint as to allege the necessary jurisdictional facts. Plaintiff then moved for leave to amend their complaint by averring that three of them were, when the suit was commenced, and continued to be, citizens of the District of Columbia, but that one of them was a citizen of the State of Minnesota, and that each was the owner of an undivided one-fourth of the land and premises described in the complaint, and that they severally claimed damages and demanded judgment. This motion was denied and the action dismissed. Plaintiffs then sued out a writ of error under the Act of March 3, 1891, Sec. 517, and the Circuit Court certified to this Court these questions of jurisdiction:

FIRST.—Whether or not said complaint sets forth any cause of action in which there is a controversy between citizens of different States, so as to give said Circuit Court jurisdiction thereof.

SECOND.—Whether or not said complaint, as so proposed to be amended, would, if so amended, set forth any cause of action, in which there is a controversy between citizens of different States so as to give said Circuit Court jurisdiction thereon.

Chief Justice Fuller rendered the opinion of the Court, and he held that the Circuit Court had no jurisdiction of the action because three of the plaintiffs being citizens of the District of Columbia there was no controversy between citizens of different States. He further said *there was no appli-*

cation made for leave to discontinue as to the three plaintiffs who were citizens of the District of Columbia and to amend the complaint and proceed with the cause, in favor of the plaintiff alleged to be a citizen of Minnesota.

The difference between the above case and the one at bar is that the plaintiff in the case at bar has asked leave to dismiss as to the defendants who are citizens of the State of New Jersey and amending the bill of complaint by alleging facts that the "fund" in question is a "trust fund" and that therefore the controversy is between citizens of different States with reference to the control of that fund, pending the suit in Utah.

In the above case we surmise that had the plaintiff dismissed as to the three citizens of the District of Columbia this Court would have held in that case that the United States Circuit Court of the District of Wisconsin had jurisdiction over the controversy in reference to the land located in Wisconsin on behalf of the plaintiff who was alleged to be a citizen of the State of Minnesota against the defendants who were alleged to be citizens of the State of Wisconsin.

POINT V.

It is not true as appellees insist that the shares of the Rio Grande Western Company referred to in the advertisement, belong to themselves and to those they represent.

(*A.*) In other words the appellees insist this bill is brought for the purpose of taking from appellees' firm moneys belonging to that firm and other moneys which they hold or about to hold for others, and for which they are liable to others.

(*B.*) They further insist that the persons whom they represent, not being made parties to the bill of complaint, the moneys referred to cannot be taken from the appellees.

(*C.*) The appellees insist further that every member of the firm of Spencer Trask & Company is directly interested in the result of this suit, and that for that reason every member of this firm is a necessary party to this suit.

The appellee Edwin M. Bulkley, in his affidavit, in speaking of the object of the advertisement in the *Herald*, says (P. R., 11, 12, 13), that the proposed purchasers of the stock of the Rio Grande Western Railway Company were not familiar with the suit pending in the Utah Court, and that *appellee's firm was familiar with that suit*, and felt bound to protect the purchaser against loss or diminution of the value of the common stock to be so purchased in case the complainant's claim against the said Spurs should turn out to be valid, and, therefore, my firm agreed to indemnify the proposed purchaser against loss, if any, by reason of such suit. Appellee further says in his affidavit that his said firm was the owner of some of the common shares proposed to be sold, and in stipulating to sell as many as 90,000 shares, it had the assent of such other holders of such common stock, and that after making the agreement to sell the stock it invited other owners who cared to join in the sale to deposit their shares with his firm for the purpose of such sale, and that it was deemed proper that all the owners of such common stock who should avail themselves of the sale, should indemnify the firm against any liability by reason of such guarantee. My firm, therefore notified the holders of the common stock that if they availed themselves of the sale they must permit the firm to deduct from the purchase price when paid, a suitable amount to indemnify the firm against liability to the purchasers.

In the published notice in the *Herald* appellee's

firm said (P. R., 4), that from the eighty dollars per share for which the firm have agreed to sell the shares the firm will deduct such amount per share as will protect the firm against such guarantee and says further: "*Such amount will be held in a special "trust.*"

Appellee George Foster Peabody, in his affidavit (P. R., 73) says: "The result of this provision is that if the complainant has any just claim its payment is secured not only by the great excess of the assets of the Rio Grande Western Company itself over its debts *but also by a special amount to be held in trust.*" * * * "*As it gives a greater assurance that if the complainant's claim shall be established it will be paid.*"

Is it not therefore manifest from not only the declaration of the notice in the *Herald* that "*such amount will be held in a special trust*"? Not only for the purchasers of the stock who were not familiar with the Utah suit but as a "*greater assurance*" *that if the complainant's claim should be established it will be paid.*"

(*D.*) *Does not the words quoted establish an obligation to the complainant on the part of the appellees, that the amount of money so set aside is a special trust, for the very purpose of clearing up the title to the Spurs in litigation in the Utah suit, in case complainant succeeded in that suit?*

(*E.*) Appellant insists *that a trust fund was created,* and while it was moneys contributed by not only the appellee's firm but by other stockholders who were anxious that the sale of the Utah Road should be made to the Colorado Road, *it was with the understanding that in case the complainant succeeded in the Utah suit that that trust fund should be used, as the appellee, George Foster Peabody, distinctly says "A special amount to be held in trust, as a greater assurance that if the complainant's claim should be established it will be paid,"* and if

the complainant does not succeed in his Utah suit then that the moneys contributed to said trust fund will be returned to the parties contributing the same.

Now the moment complainant in the court below comes into a court of equity and asks the aid of the Court *to put this trust fund* in a position where in case complainant shall succeed in his Utah suit that fund shall be applied towards the liquidation of complainant's claim, if any deficiency judgment shall be established in his favor in the Utah suit, then we hear for the first time the appellee's contention contrary to their own declarations, viz., that this bill of complaint in the court below is an attempt to deprive the appellees individually as members of that firm of their respective interests as a firm in that money.

Appellees concede that the Utah suit is still pending and undetermined; how, then, can the appellees be injured by the restraining order made by his Honor Addison Brown, wherein the appellees "are enjoined (P. R., 87) until the further order of this Court from paying out or parting with the fund or moneys for indemnity to them or *special trust* which shall come to or be in their hands or under their control pursuant to their advertisement?"

This order was what the appellees offered to do and which his Honor Judge Brown considered the appellant had a right to expect in case complainant succeeded in his Utah suit to have this money applied towards complainant's claim.

(*F.*) Again appellant's amendments as proposed and appellant's supplemental bill as proposed, *show distinctly that it was the understanding by the persons contributing to that fund that the fund should be used as a trust fund for the purposes indicated.*

(*G.*) *The relations of the appellees therefore, to that fund was that of trustees for the benefit of the cestui que trusts* of which the appellant was the

chief beneficiary and had a right if he apprehended waste in his mortgage security by the diversion of the net earnings the $800,000 then in the possession of the Rio Grande Western, to have that fund put under the control in a court of equity, pending that Utah suit.

(*H.*) Appellant concedes that there are none of the other contributors to this fund, parties to this action. Appellant insists that it is not necessary that they should be parties if, as a matter of fact, *they have consented that the appellees shall act as trustees of that fund for the purpose of using the same for the purposes indicated.*

(*I.*) The service of process in this action upon Acosta Nichols, the appellee, who is conceded to be a citizen of the Southern District of New York, as a member of the said firm, and the *fund itself being within the jurisdiction of the Court,* it being conceded by appellees that the firm is engaged in carrying on the banking business in the City of New York, such a decree of distribution of said fund will be sufficient protection to the members of that firm against any claim of liability on behalf of the contributors to said fund.

(*J.*) The appellees sumbitted the following authorities in the Court below to undertake to sustain their theory that the rights of the appellees concerning said fund *is that of partners and not trustees.*

The case of *Stone* vs. *South Carolina, 117 U. S., 430,* was a suit brought originally by the State of South Carolina in its own court to recover moneys in the hands of two partners, Corbin and Stone. Stone sought to remove the cause to the Federal court on the ground that although his partner was a citizen of South Carolina he himself was a citizen of New York and the presence of his co-defendant being such citizen of South Carolina, was not essential to a final determination of the contro-

versy so far as he was concerned. This Court denied the Federal jurisdiction because Chief Justice Waite in rendering the opinion said "that neither is there any separable controversy in the case such as might, if necessary citizenship existed, allow Stone to renew the suit without joining Corbin in the petition for removal." In other words, Stone & Corbin as a firm had collected money belonging to the State of South Carolina, and a firm obligation existed to repay that money to the State.

(*K.*) There is no such principle as in the above case involved in the case at bar, viz., *the parties who deposited this money in the hands of the appellees as trustees are not seeking in this Court to compel the appellee's firm to return to them the money. Appellant is not seeking an individual judgment against members of appellee's firm, only seeking to have the fund administered by the Court below instead of by the appellees in case complainant succeeds in the Utah suit.*

The case of *Bell* vs. *Donahue, 17 Fed. Rep., 710,* which appellees cite, was where a bill was filed to set aside a conveyance made to one member of the partnership of property acquired by him in his individual name but in behalf of the partnership. It will be seen therefore that the real question was as to how the partnership rights in the property could be determined without all the members of the partnership were defendants, which if done would make one of the partners a citizen of the same State with complainant thereby ousting the jurisdiction of the Court.

(*L*). This is not the case at bar. The money constituting the *trust fund does not belong to the firm of Spencer Trask & Company. It belongs to the parties contributing and the firm only has a legal title, not an absolute ownership of the fund.* The appellant is one of the beneficiaries of that fund and the

principal beneficiary in case of the success in the Utah case.

In the case of *Duchesse d'Auxy* v. *Porter*, *41 Fed. Rep.*, *68*, cited by appellees, the suit was by an administrator of a deceased partner against three surviving partners, two of whom were citizens of the same State, as complainant. There was no dispute but what they were partners and of course, that fact being admitted it was essential that all the partners were indispensable parties to the litigation, and in making them parties to the litigation they deprived the Court of jurisdiction.

(*M.*) Appellant insists that the firm of Spencer Trask & Company has no interest in the controversy in this action *except that as trustees of a fund* to be administered in an emergency, and that being true, and the *Court having jurisdiction of the firm*, and a service of process upon one member of that firm, Acosta Nichols, it is sufficient to give the Court jurisdiction.

The case of *Adams* v. *May*, *27 Fed. Rep.*, *907*, cited by appellees, was a case where on an application for a removal to the federal court it was simply alleged that the defendant's firm was a resident of a different State than the plaintiff, and it was held that the diverse citizenship was not sufficientiy alleged.

In the case at bar in the proposed amendment to the bill of complaint in the court below the complainant offered to dismiss as to the appellees, Bulkley and Charles J. Peabody, who were citizens of the same State as plaintiff. Said proposed amendments alleged that said last named appellees' interests in said firm were that of junior partners, while a majority of interest in the firm was owned by Spencer Trask and George Foster Peabody, and due service of process has been made upon the three remaining members of that firm, Spencer Trask, George Foster Peabody and Acosta Nichols, which was sufficient

to give the Court jurisdiction over *the fund* in case of complainant's success in the Utah suit.

The case of *Mason* v. *Eldred, 6 Wall, 231-235*, which was cited by appellees, was a suit where the only question in controversy was concerning a copartnership obligation, and, therefore, it necessarily involved the obligations of each partner, and that if such necessary party as a member of a copartnership is not brought into the action, the omission to do so may be pleaded in abatement.

This is not the case at bar. The appellees by their own admissions, both by the notice in the advertisement in the *Herald* as well as by the respective affidavits of the appellee Bulkley and of George Foster Peabody, above quoted, that the fund in controversy is admitted to be *a trust fund, and not a copartnership obligation, and, therefore, it is not essential, for the adjudication of the rights of all parties in interest, that only the Court has jurisdiction on the fund in question as it has already acquired in this case, and of which his Honor Judge Addison Brown took jurisdiction when he made the order above referred to.*

The Court will observe that in this suit the rights of Messrs. Bulkley and Charles J. Peabody are not involved, and that it is in this action not sought to take from them their property or to recover a personal judgment against them, because it is only an action to administer upon the fund in question to carry out the admitted purpose of the creation of that fund by the admissions of the members of the appellees themselves.

POINT VI.

One member of a copartnership having been served with process it is held in this court against whom the

Court has taken jurisdiction, may as to partnership assets even admitting that there was some joint liability of this firm over the moneys in question, the partnership assets in question are concluded by a judgment obtained by such service.

(*A.*) The state courts and the federal courts alike will permit a judgment binding partnership assets and against a party actually served binding him individually.

Barney v. *Baltimore City*, 6 Wall., 280–7.

Hall v. *Lansing*, 91 U. S., 160, 166–169.

(*B.*) The judgment of the Court in the court below, with the service of the subpœna against the appellee, Acosta Nichol, affecting the rights of the members of the firm of Spencer Trask & Company *to the trust fund* in question, is binding upon all the other members of the firm, whether they were served with process in the action or not.

POINT VII.

The bill of complaint in the court below can be sustained as an ancillary bill.

In the case *of Pacific R. R. of Miss.* v. *Miss. Pac. R. R.*, *111 U. S.*, *505*, Justice Blatchford in defining what is an ancillary bill, says, that in ancillary bills the Circuit Courts of the United States have jurisdiction, although the complainant and some of the defendants may reside in the same district.

Under the act of March 3, 1875, Section 8 pro-

vides: That if any suit to enforce any legal or equitable claim or to remove any lien or cloud on property situated in the district where the suit was brought, inhabitants thereof can be made parties and brought into court for the purpose of enforcing the lien.

In the case of McBee *vs.* Marietta & N. G. Ry. Co., 48 Fed. Rep., 243, it was held that under the section above referred to that for the purpose of enforcing various liens upon part of the railroad lying in the district against the lien of a general mortgage which is about to be foreclosed in the same court by a suit ancillary to another suit in a different district, an original bill may be maintained though some of the defendants are not residents of the district. While such a bill is an original bill, within the meaning of that term as used in equity pleading, yet the suit in its essence is ancillary to the foreclosure suit, which it seeks to oppose, hence the Court's jurisdiction is unaffected by the fact that some of the defendants are residents of the same State as complainant, and the Court has jurisdiction.

In the case of *Greely* vs. *Lowe*, *155 U. S.*, *58*, page 73, Mr. Justice Brown says: "That where the *res* is within the jurisdiction of the court where the suit is brought to enforce a lien and persons in control of the fund are not found within the district so as to serve process, they may be brought in by publication under Section 738."

We therefore submit that the Court below had jurisdiction of this case.

Respectfully submitted,

CHARLES LOCKE EASTON,
Counsel for Appellant.

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Supreme Court of the United States,

MARTHA RAPHAEL, as Administratrix of the Estate of NATHANIEL W. RAPHAEL, deceased,

Appellant,

AGAINST

SPENCER TRASK, GEORGE FOSTER PEABODY, EDWIN M. BULKLEY, CHARLES J. PEABODY and ACOSTA NICHOLS,

Appellees.

Number 229.
October, 1903.

Mem. for Appellees upon Appellant's Motion to Advance Cause.

The Appellees respectfully submit that this cause ought not to be advanced, and for the reason, among others, stated in the accompanying affidavit of Mr. Wm. Mason Smith. If the decree against the Appellant in the original suit shall be affirmed in the United States Circuit Court of Appeals which, in December next, is to hear the appeal from it, the present suit would be of necessity ended, since it is brought only to recover from a fund alleged to be in the hands of the Appellees to meet the anticipated or supposititious recovery in the suit thus to be heard in the United States Circuit Court of Appeals. It is submitted that in no case should the Appellees be put to the expense or trouble of arguing the present appeal in this Court, while the Utah judgment bars any recovery here; but that the Appellant here should wait here until her appeal from the conclusive decree in the Utah suit should be heard, as it will be in December next, and decided.

The Appellees respectfully insist upon an oral argument of this cause if and when it shall be brought on in this Court. It is true that the cause comes to the Court upon the question of the jurisdiction of the Court below. But that question in large part involves the whole of the controversy. No jurisdiction was claimed below by reason of diversity of citizenship. It was claimed solely on the ground that the suit was ancillary to the bill against the Rio Grande Western Railway Company in the Federal Court in Utah. The Court below held that by reason of the facts the suit was not ancillary. When the case shall be presented to this Court, that question will need to be argued.

It is submitted that the motion should be denied.

New York, October 12th, 1903.

EDWARD M. SHEPARD,
Of Counsel for the Appellees.

SUPREME COURT OF THE UNITED STATES.

MARTHA RAPHAEL, as Administratrix of the Estate of NATHANIEL W. RAPHAEL, deceased,

Appellant,

vs.

SPENCER TRASK, GEORGE FOSTER PEABODY, EDWIN M. BULKLEY, CHARLES J. PEABODY and ACOSTA NICHOLS,

Appellees.

Number 229. October, 1903.

UNITED STATES OF AMERICA,
State of New York, } ss.:
County of New York,

WILLIAM MASON SMITH, being duly sworn, says: I am one of the solicitors and of counsel for the Appellees in this suit. It was brought in the Court below to reach a fund alleged to be in the hands of the Appellees and to be there applicable to meet a claim which the original Appellant, Nathaniel W. Raphael, had sued to recover from the Rio Grande Western Railway Company. The complainant claimed that the present suit was ancillary to such former suit. Such former suit was brought in January, 1901, in the Circuit Court of the United States for the District of Utah against the Rio Grande Western Railway Company and others, but not against any of the Appellees in this suit. A large amount of testimony was taken in that suit and in June, 1902, a final decree was made dismissing the bill of compiaint upon the merits. From that decree an appeal was taken which is now set for hearing before the Circuit Court of Appeals for the Eighth Circuit in December next. The Appellant, Nathaniel W. Raphael, in his life time declined, and his successor in interest has since his

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1903,—No. 229.

MARTHA RAPHAEL, Administratrix of the Estate of NATHANIEL W. RAPHAEL, Deceased,

Appellant,

VERSUS

SPENCER TRASK, GEORGE FOSTER PEABODY, EDWIN M. BULKLEY, CHARLES J. PEABODY, and ACOSTA NICHOLS,

Appellees.

Brief for Appellees.

Appeal from a decree of the Circuit Court of the United States for the Southern District of New York dismissing the complainant's bill for want of jurisdiction.

The original complainant, Nathaniel W. Raphael, brought this suit, in the Circuit Court of the United States for the Southern District of New York, against the defendants constituting the banking firm of Spencer Trask & Co., bankers, to

restrain them from selling certain shares of the common capital stock of the Rio Grande Western Railway Company until, out of the proceeds of sale, a fund should be deposited in a Trust Company to satisfy a claim which the complainant was asserting against the Railway Company by suit in the Circuit Court of the United States for the District of Utah.

Bill, prayer for relief, *p.* 8.

Since the decree below was made and the appeal from it taken by the original complainant, he has died, and the administratrix of his estate substituted as appellant in his place.

The bill alleged that the complainant was a citizen of New Jersey and that the defendants were citizens of New York and of the Southern District of New York (*p.* 1).

The defendants, specially appearing, filed a plea to the jurisdiction, averring that, while the plaintiff was, as he alleged, a citizen of New Jersey, the defendants Edwin M. Bulkley and Charles J. Peabody were, at the commencement of this suit, likewise citizens of New Jersey and, for more than eight years prior to such commencement had been, (plea, *p.* 90). The complainant brought the cause on for argument upon the bill of complaint and the plea (Recital in decree, *p.* 94); and thereupon a decree was made by the court below dismissing the bill with costs.

Decree, *p.* 95.

The court below also certified to this Court the following question:

> "Is this court (the Circuit Court) without "jurisdiction of this cause for the reason that "the bill of complaint is not ancillary to the "suit pending in the United States Circuit "Court for the District of Utah and because "the defendants Edwin M. Bulkley and "Charles J. Peabody are citizens of the same "state as the complainant and are necessary "parties defendant to this action."

The opinion of the court below directing a dismissal was filed on 29th August, 1902; but the decree of dismissal was not granted until 15th November, 1902 (*p.* 94). Between the rendering of the decision and the entry of the decree the complainant moved for leave to amend his bill; and the present record contains the moving papers and the papers of the defendants in opposition, the opinion of Judge Coxe, and his order denying the motion (*pp.* 95-120). With these papers we do not understand that we are here concerned. The present appeal is taken from the decree of dismissal; nor did the complainant in his assignments of error refer to the denial of his motion to amend.

Petition of appeal and order allowing it, *pp.* 122, 123.
Assignment of Errors, *pp.* 123, 124.
Citation, *p.* 127.

FACTS.

The substance of the allegations of the bill was as follows:

That the complainant on 7th January, 1901, filed a bill of complaint in the Circuit Court for the District of Utah against the Wasatch & Jordan Valley Railway Company (called the *Wasatch* Company) and the Rio Grande Western Railway Company (called the *Western* Company) and others to foreclose a mortgage given by the Wasatch Company to secure a series of its alleged mortgage bonds of which the plaintiff claimed to be the owner of $579,000 in par value with overdue interest thereon for nearly twenty years to the amount of $825,976.83, making a total of principal and interest of $1,404,970.83 (*p.* 19);

That the property alleged to be mortgaged consisted of two spurs of the main line of the *Western* Company in Utah; That The Western Company and its predecessor, the Denver & Rio Grande Western Railway Company (called the *Old Western* Company) had acquired the property through foreclosures of mortgages prior to the alleged mortgage under which the complainant claimed; That there were irregularities or invalidities in such foreclosures of prior mortgage; that the *Western* Company was, therefore no more than a mortgagee in possession; and that the complainant in such Utah suit had asked a foreclosure of his alleged mortgage and an accounting by the *Western* Company, as a mortgagee in possession, for rents and profits.

Bill, *p.* 2.

Bill in Utah suit appended to the bill in this suit, *pp.* 17-29.

That in such Utah suit the *Western* Company had filed its answer on 25th April, 1901, a copy of which was annexed to the present bill (*pp.* 42-62).

That complainant had applied to Judge *Thayer* of the Eighth Circuit for the appointment of a receiver of such spurs of railroad, and that such motion was heard upon the bill in that suit and certain affidavits, documents and depositions, copies of which were appended to the bill (*p.* 30. Documents and Depositions, *pp.* 42-80).

> NOTE: A large part, however, of the affidavits and depositions annexed to the present bill and alleged in it are not printed (Index, *pp.* II-IV).
>
> There is no allegation in the bill affirming the truth of the statements contained in the papers submitted to Judge THAYER by the complainant or by the defendants in the Utah suit (Bill, *pp.* 2-3). It is only the fact that such statements were made in such papers,—not the truth of the statements, which was put before the court below, or is before this Court.

That on 6th April, 1901,—that is to say, after the filing of the complainant's bill in the Utah suit and after he had made his motion for a receiver,—the present defendants, constituting the banking firm of Spencer Trask & Co., carrying on business at the City of New York, published an advertisement in which they stated that they had, in behalf of the holders of more than ninety per cent. of the common stock of the *Western* Company, negotiated the sale of that stock with other property to representatives of the Denver & Rio Grande Railroad Company; that they had secured the right to include in the contract all the outstanding common stock of the *Western* Company

(that is to say, the small minority not included in the "more than ninety per cent." which the defendants already owned or represented); that such outstanding common stock must come in on the same terms as the stock already represented by them; and that the advertisement contained this statement (*p.* 4):

> "Since the commencement of the negotia-
> "tion, one Raphael has instituted in the
> "United States Circuit for Utah a suit against
> "the title of the Western Company to the
> "Bingham and Alta spurs of its railroad;
> "and in making the contract for the vendors
> "our firm gave its personal guarantee against
> "any liability of the Company in that suit.
> "Although the Company's solicitors are con-
> "fident of success, it is proper that our guar-
> "antee be ratably shared by all who avail
> "themselves of the contract made by us with
> "the vendors. From the $80 per share and
> "interest mentioned above we shall, there-
> "fore deduct such amount per share as coun-
> "sel shall advise us will amply protect us
> "upon such guarantee. Such amount will be
> "held in a special trust."

That the defendant George Foster Peabody in an affidavit in opposition to the motion for a receiver (*p.* 7),

> "*says* that the provision for a fund to be
> "created out of the sale of the shares of the
> "capital stock of the Rio Grande Western to
> "the Denver & Rio Grande Western is to be
> "left in the control of Spencer Trask & Com-
> "pany to be held in trust as a greater assur-
> "ance that if complainant's claim shall be es-
> "tablished, it will be paid."

That Judge THAYER denied the complainant's motion in the Utah suit for a receiver, and that the Utah suit (*p.* 7)

> "is pending and undetermined and that if "the scheme of Spencer Trask & Co. is "allowed to be carried out * * * it "will hinder and delay your Orator in the "prosecution of his said suit in Utah."

The passage in Mr. Peabody's affidavit to which reference in the bill is made, appears at *pp.* 73, 74, of the record, the affidavit being one of the papers annexed to the present bill of complaint. It is as follows:

> "One stipulation of the agreement for the "sale of common stock of the Rio Grande "Western Railway Company made by my "banking firm of Spencer Trask & Company is "that my said firm shall guarantee the pur- "chaser against any claim of the complainant "in this suit. The statement in that respect "contained in the circular letter of my firm "to the holders of the common stock of that "Company, of which one of such cuttings is a "copy, is as follows:
>
> " 'Since the commencement of the negotia- " 'tion one Raphael has instituted in the " 'United States Circuit Court for Utah a " 'suit against the title of the Western Com- " 'pany to the Bingham and Alta spurs of " 'its railroad; and in making the contract " 'for the vendors our firm gave its personal " 'guarantee against any liability of the com- " 'pany in that suit. Although the company's " 'solicitors are confident of success, it is " 'proper that our guaranty be ratably

"'shared by all who avail themselves of the
"'contract made by us for the vendors. From
"'the $80 per share and interest mentioned
"'above we shall, therefore, deduct such
"'amount per share as counsel shall advise
"'us will amply protect us upon such guaran-
"'tee. Such amount will be held in a special
"'trust.'

"The *result* of this provision is that if the "complainant have any just claim, its pay-"ment is secured not only by the great excess "of the assets of the Rio Grande Western "Company itself over its debts, but also by a "special amount to be held in trust. I am "advised by the counsel of the Western Com-"pany that such provision is a fact against, "and not in favor of, the complainant's mo-"tion, as it gives a greater assurance that, if "the complainant's claim shall be established, "it will be paid.

"The statement of the said Raphael in his "affidavit that the retention of a fund to in-"demnify my said firm for their proposed "guaranty against complainant's claim, is an "attempt on the part of the Western Com-"pany to hinder and delay the complainant, "is unqualifiedly false. The Western Com-"pany is in no way a party to the agreement "or provision for such indemnity or such "guaranty. The Western Company, if the "purchase of its common stock shall be com-"pleted, will be itself indemnified against any "claim of complainant."

The whole of the complainant's imaginary cause of action was, on the argument below, made to turn upon such statement of Mr. Peabody as to the *result* of the indemnity which his firm had taken

from the holders of common stock coming into the sale negotiated by them, to protect themselves against the guaranty that they had given the purchasers of the common stock against the complainant's claim in the Utah suit. Such *result,* so Mr. Peabody stated his opinion, was that not only was the payment of the complainant's claim in the Utah suit,—if there were any such valid claim,—assured by the assets of the *Western* Company, which was the alleged debtor,—but that such claim was also secured by the liability which the defendants had assumed to the purchasers of the common stock to provide against the claim, and by the fact that Spencer Trask & Company had taken security from the vendors of the common stock to indemnify them, Spencer Trask & Company, against their liability on the guaranty.

Obviously what Mr. Peabody meant was,—not that his firm had assumed any contract or trust relation to complainant,—but that the liability his firm had assumed to the purchasers of the common stock, and the security they were taking, created assurance, in addition to the responsibility of the Western Company, that the complainant's claim, if void, would be established. The complainant thus sought to turn a guaranty of Spencer Trask & Company, inserted in the agreement for sale of the common stock in order to protect the purchasers from the loss which would follow complainant's successful assertion of his claim, and the subsequent attempt of Spencer Trask & Company to secure from their customers indemnity against their own liability on such guaranty,—into a stipulation for complainant's benefit,—and

that, although it was obvious that he was in no manner of sense whatever a party to the sale of the common stock, or to any arrangement between Spencer Trask & Co. and their vendees or their customers.

The bill expressly alleged that the present defendants were "not parties to the suit pending in "Utah," and that there was "no agreement exist-"ing between complainant and the other holders "of outstanding bonds similar to complainant's "bonds" and Spencer Trask & Company by which the said proposed fund should "be applied to-"wards the satisfaction of complainant's bonds" (*p.* 7). The bill further alleged,—

"That if said consolidation as set forth in the "scheme contemplated by the advertisements re-"ferred to is allowed to be carried out without "some stipulation between your orator and the "members of said firm of Spencer Trask & Com-"pany as to the custody of said fund proposed to "be created as aforesaid, the rights of remote pur-"chasers of the mortgaged premises upon which "complainant claims a lien will have intervened "pending complainant's suit in Utah so that if "complainant succeeds at the final hearing of his "suit in Utah, it will require the bringing into "the suit as defendants such remote purchasers "as the Denver & Rio Grande Western Railway "Company and their proposed successors" (*pp.* 7, 8).

And also that the present defendants, when they obtained an option upon the shares of the common stock of the *Western* Company which they were selling, had notice of the complainant's suit in Utah against the *Western* Company and that "the se-

"curement of said option from said vendors by "the said firm of Spencer Trask & Co. was in dis- "regard of complainant's right and to prevent the "mortgaged premises to remain *in statu quo* until "the final hearing of a suit in Utah."

Such is the bill of complaint. Judge THOMAS in the court below found no difficulty in sustaining the defendants' plea to the jurisdiction. It was obvious that, as two of the defendants were citizens of the same State with the complainant, the court had no jurisdiction unless the present bill could be treated as one ancillary to the bill in the Utah suit. But Judge THOMAS thus disposed of the latter theory in his opinion (*p.* 93):

"The defendants in the second suit are in no "wise related to the cause of action in the first "suit; they hold no property of the obligated cor- "porations; they may not be asked to discharge "the judgment, or to render any account looking "to its payment; they have made no agreement "with the complainant, or that enures to him. They "chanced to be dealers, on their own account, or "that of others, in nowise in privity to any party in "the first suit, in the stock of a company whom "the complainant hopes to show has no better "title to the railway than that of earlier mort- "gagees in possession; and yet the complainant "asks to restrain the transfer of such stock lest "the mortgaged premises should not remain '*in* "'*statu quo* until the final hearing of complain- "'ant's suit in Utah.'

"Under neither bill is any demand for any re- "lief made against the stockholders, no process "could run against them in case of favorable judg- "ment in the first suit, and it would be indifferent "to the complainant where or by whom the stock

"was held. Spencer Trask & Co. are entire "strangers to them and to all persons owing them "any duty, and no fund reserved by that firm be- "longs to complainant or could be reached by him, "nor is such relief asked. The entire absence of "privity between the parties in the second suit to "any and all parties in the first suit or to the sub- "ject-matter thereof; the entire absence of any "duty from the defendants personally or as trus- "tees to the complainant, forbids even the sug- "gestion that this suit is ancillary in its nature."

The present record discloses that, upon final hearing, the complainant's bill in the Utah suit was dismissed, the court there finding that the complainant had purchased his five hundred and seventy-nine bonds when they were about twenty years in default, paying less than $2 for each $1,000 bond with twenty years' interest accumulated; that the complainant was not a purchaser in good faith or for value; and that there was nothing fraudulent or irregular in the foreclosure under which the *Western* Company acquired its title.

Opinion of Judge ADAMS, *pp.* 111-116.

The complainant having brought on the cause for argument (Decree, *p.* 94) upon his bill of complaint and upon the plea,—the allegations of the plea had to be taken as admitted; and the complainant is in the position of demurring to the plea.

Farley v. *Kitson*, 120 U. S., 303, at *p.* 314.
Rhode Island v. *Massachusetts*, 14 Peters, 210, at *p.* 257.

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Argument.

I.

The Court below had no jurisdiction because the defendants Bulkley and Charles J. Peabody were co-citizens with the complainant of the State of New Jersey.

As the federal jurisdiction here depends upon diverse citizenship, and as the controversy is indivisible, all of the parties on one side must be of a citizenship diverse from all of the parties on the other side.

Blake v. *McKim*, 103 U. S., 336.
Anderson v. *Watt*, 138 U. S., 694, 702.

It was argued below that, as the defendants are copartners and some of them citizens of New York, the suit may proceed against the latter, ignoring their copartners who are co-citizens of the State of New Jersey with the complainant. But this, it is submitted, is not the law.

The purpose of the suit,—the very judgment prayed,—is the restraint of the defendant firm from selling shares of the capital stock of the Rio Grande Western Company belonging to themselves, and shares of the same company belonging to those whom they represent and to whom they

are liable, unless the firm "shall agree to turn over "to some Trust Company in the City of New York "at and before the completing of said sale of said "shares a sum of money which may be determined "by this court out of the proceeds of such sale." That is to say, the effort is to take from the defendant firm moneys belonging to them and other moneys which they hold for others and for which they are liable to others. No one of such other persons has been made a party.

Every member of the firm is directly (and, indeed, so far as appears, equally) interested in the result of the suit. Every member of the firm is a necessary party,—not merely a proper party, but an absolutely necessary party. Any judgment must affect the property rights of every member of the firm. The court below could not deal with the questions involved unless and until it should have every member of the firm before it. Until then the court could not take cognizance of the cause. Nor, unless it had or might lawfully have jurisdiction of all the parties, was the cause within its jurisdiction. Upon this the authorities are clear.

Stone v. *South Carolina,* 117 U. S., 430: The suit was originally brought by the State of South Carolina in its own court to recover moneys in the hands of two partners, Corbin and Stone. Stone sought to remove the cause to the federal court on the ground that, although his partner was a citizen of South Carolina, he himself was a citizen of New York, and that the presence of his co-defendant, being such citizen of South Carolina, was

not essential to a final determination of the controversy, so far as he was concerned. This COURT, however, denied, the federal jurisdiction, saying, by WAITE, *C. J.*, at p. 433:

> "The cause of action is joint, and only one "of the defendants petitions for removal. "* * * Neither is there any separable "controversy in the case, such as might, if the "necessary citizenship existed, allow Stone "alone to remove the suit without joining "Corbin with him in the petition for removal. "The money sued for was received by the de- "fendants as partners; and they are liable "jointly for its payment if they are liable at "all."

Bell v. *Donohoe*, 17 Fed. Rep., 710: The bill was filed to set aside a conveyance made to one member of a partnership of property acquired by him in his individual name, but in behalf of the partnership. His copartner was not made a party to the suit. The defendant's demurrer was sustained, the court saying by SAWYER, *J.*:

> "Kelly, in my judgment, is an indispensable "party to the bill without whose presence no "decree can properly be made. * * * No "decree could finally settle the rights of "Donohoe and Kelly or complainant without "the presence of Kelly. Donohoe is as much "entitled to have his rights finally determined "in the case as the complainant. The case "is, in my judgment, clearly within the prin- "ciple established in *Shields* v. *Barrow*, 17 "How., 139; *Barney* v. *Baltimore*, 6 Wall., "280; *Burke* v. *Flood*, 6 Sawy., 220 [s. c., 1 "Fed. Rep., 541], by Mr. Justice Field in *C.*

"*S. Min. Co.* v. *V. & G. H. W. Co.*, 1 Sawy., "687; and in *Ribon* v. *Railroad Co.*, 16 Wall., "450. It is difficult to perceive how partner- "ship rights can be finally determined as to "anybody without the presence of all the part- "ners * * * As Kelly is a citizen of the "same state with complainant, making him a "party would doubtless oust the jurisdiction "of the court."

Duchesse d'Auxy v. *Porter*, 41 Fed. Rep., 68: The suit was by the administrator of a deceased partner against three surviving partners, two of whom were citizens of the same State as the complainant. The court decided that there was no federal jurisdiction, notwithstanding section 737 of the Revised Statutes, which permitted the Court to proceed against parties properly before it, though some of the defendants were not within the district, and could not be served with process, saying by SHIPMAN, *J.*:

"It is well settled that this section does not "require a court to entertain or continue juris- "diction of a suit, especially in equity, where "non-resident defendants are parties of such "importance that complete justice cannot be "done between the parties to the suit without "their presence, and they have not voluntarily "appeared. * * * It has furthermore been "held that the section 'does not affect any case "where persons having an interest are not "joined because their citizenship is such that "their joinder would defeat the jurisdiction.' "*Shields* v. *Barrow*, 17 How., 130; *Barney* v. "*Baltimore City*, 6 Wall., 285; *Jones* v. *An-* "*drews*, 10 Wall., 327; *Lovejoy* v. *Washburne*,

> "1 Biss, 416. This case comes within the "principle which the Supreme Court has been "careful to announce in the cited cases, be- "cause the accounting must necessarily in- "volve the pecuniary partnership relations of "the absent partners with the late firm of " Soutter & Co. and with the complainant."

Adams v. *May*, 27 Fed. Rep., 907: Here it was held that, where, upon an application for removal to the federal court, it was simply alleged that the defendant firm was a resident of a different State from the plaintiff, the diverse citizenship was not sufficiently alleged, but that the citizenship of each and every partner must be alleged so as to show that no one of them is a citizen of the same State as the plaintiff. The Court said by LOVE, *J.*:

> "The individual names of the partners must "be set out, and citizenship alleged of each "and every of them. The state statute "authorizing suits to be brought in the part- "nership name is inapplicable here. No doubt "a cause commenced in a state court in the "firm name, without giving the individual "names, may be removed to this court; but "the petition for removal should state the in- "dividual names and citizenship of the mem- "bers of the firm, and show that no one of "them is a citizen of the same state with an "adversary party in the controversy. * * * "For aught that we can see, some member or "members of the firm of Adams & Co. may be "citizens of the same State with the defend- "ants."

Mason v. *Eldred*, 6 Wall., 231, 235: This COURT said, by FIELD, *J.*:

> "But in copartnerships there is no such sev-
> "eral liability of the copartners. The co-
> "partnerships are formed for joint purposes.
> "The members undertake joint enterprises,
> "they assume joint risks, and they incur in all
> "cases joint liabilities. In all copartnership
> "transactions this common risk and liability
> "exist. Therefore it is that in suits upon these
> "transactions all the copartners must be
> "brought in, except when there is some
> "ground of personal release from liability, as
> "infancy or a discharge in bankruptcy; and
> "if not brought in, the omission may be plead-
> "ed in abatement."

Nor is this a matter of service of process. The defendants could not, if they would, consent to and thereby confer jurisdiction of a suit brought by a complainant of like citizenship with them. The point would be taken by the Court itself against consent of all the parties,—and even in this Court on appeal.

> *Anderson* v. *Watt,* 138 U. S., 694, 702.
> *Morris* v. *Gilmer,* 129 U. S., 315, 325.

The question is entirely different from that which arises where the cause is justiciable by the Court against all the members of the firm, but where only one of them is served. A defendant who is made a party, and against whom the Court may take jurisdiction, and who can, if he will, come in to protect himself, may, as to partnership assets, be concluded by a judgment obtained after service on his copartners. The state courts and the federal courts alike will permit a judgment against a

copartnership binding partnership assets and against the partner actually served binding him individually.

Barney v. *Baltimore City,* 6 Wall., 280-287.
Hall v. *Lanning,* 91 U. S., 160, 166-169.

Simonds v. *Speed,* 6 Richardson (S. C.), 390: It was here expressly held under an act which permitted judgment against a firm after service on one partner, that all the partners must be made defendants.

The general rule that every member of a firm must be a party to a suit affecting rights or property of the firm has never been doubted.

Marvin v. *Wilber,* 52 N. Y., 270.
Woodhouse v. *Duncan,* 106 N. Y., 527, 534.
Wooster v. *Chamberlin,* 28 Barb., 602.

II.

The bill cannot be sustained as an ancillary or supplemental bill or as a bill otherwise not original.

This was the principal contention of the complainant upon the argument. An ancillary bill must from its very nature be filed in the same court as the original bill, and against the same

parties, or their assignees or privies in interest, and with reference to the same subject-matter.

Story on Equity Pleading, 10th ed., §§326-342.
Christmas v. *Russell,* 14 Wall., 80.
Marshall v. *Holmes,* 141 U. S., 599.
McDonald v. *Seligman,* 81 Fed. Rep., 753.
Dunn v. *Clarke,* 8 Pet., 1.
Root v. *Woodworth,* 150 U. S., 401, 411.
Daniels Chancery Practice, 6th Am. Ed. (references to original paging) vol. I, pp. 305, 306; vol. II, pp. 1515-1547.
Encyclopædia of Pleading & Practice: Definition of "bills not original" in article on "Bills in Equity" in vol. 3 at p. 339; Article on "Supplemental Pleadings" in vol. 21 at p. 4 *et seq.*

The present suit is brought in a different court from the original suit, and against entirely different parties. No one of the present defendants is a defendant in the original suit or a representative through assignment or otherwise of any defendant in that suit. No one of the defendants in the original suit is a defendant here, or represented by any defendant here.

Nor is the bill ancillary in its nature. It contains no allegation whatever of any ancillary or supplementary agreement between the complainants and the defendants, or of defendants' to any obligation to complainant sought to be enforced in the original suit, or of defendants' acquisition of, or succession to, any estate or interest of or

under any defendant in the original suit. Nor is there any allegation of any change whatever in the title, possession or condition of the property involved in the Utah suit, or of any attempt to interfere with it.

It is alleged that the defendants "caused to be "published" a certain advertisement in the New York Herald; and the text of the advertisement no doubt states that the defendants had given a guaranty to their vendees of the common stock, and sought an indemnity from their customers against that guaranty. But there is no allegation whatever *in the bill* that any agreement was made by the defendants. So the bill alleges that the defendant, George Foster Peabody, *said* that the fund to be created out of the defendant's sale of the shares was to be left in their control, "to be "held in trust as a greater assurance that if com- "plainant's claim should be established it will be "paid." The allegation that Mr. Peabody *said* such and such a thing was no allegation of an agreement constituting a trust fund. What Mr. Peabody said in an affidavit in the Utah suit does not make, or serve to allege, an agreement.

But assuming, however, that the various matters stated in the defendants' advertisement and picked out of Mr. Peabody's affidavit are to be considered as original and direct allegations of this bill, nevertheless the utmost that can be inferred is this: That long after the complainant's cause of action arose,—indeed, very many years after,—the present defendants sought to make a sale of shares of stock of the Western Company

belonging to them and their clients; that at the time of making such sale they, and those who were to purchase the shares, found pending against the Western Company a suit brought in Utah upon the complainant's claim in which it was theoretically possible that a large recovery might be had against the Company; that the present defendants thereupon guaranteed the purchasers of such shares of stock against the loss to which *they*,—the purchasers,—would be put in case such claim were established, that is to say, against the injury to the value of their shares which would result from a judgment against the Company; and that, as a condition to permitting other stockholders to join in the sale, the defendants required them to assume their share of the guaranty against damage which the defendants had given the proposed purchasers.

Such is the utmost which it can be said that the present bill alleges or suggests. But such an agreement was in no way ancillary to any agreement between the complainant and the Western Company. It was not made in favor of that Company or of the complainant. If the complainant's claim against the Company were valid, it had to be satisfied before any stockholder of the Company could receive anything upon his shares. No stockholder could sell a share of stock except subject to that claim as well as to all other debts or obligations of the Company. The shifting from one ownership to another of one share or all the shares of the Company would not and could not affect in any imaginable way the validity of the claim.

The complainant's claim was not against the stockholders of the Company, but against the Company. No claim against the stockholders was asserted in the Utah suit, or is asserted here. The appellant's contention here is nothing less than this, that a creditor, or a person alleging himself to be a creditor, of any corporation, may, in advance of recovering any judgment upon his claim or other judicial recognition of it, enjoin sales, purchases, or dealings in the shares of its capital stock.

The complainant's supposed cause of action is obviously one arising out of an agreement between the defendants, who were not parties to the original suit, and the vendors of the common stock, who also were not parties to the original suit. The reality or validity of such supposed cause of action must depend upon the nature of that agreement between persons not parties to or interested in the original cause of action. The mere fact that the recovery of a judgment in the original Utah action is an indispensable ingredient to the supposed cause of action against the defendants here, neither makes nor helps to make the present bill other than an original one (*Christmas* v. *Russell*, 14 Wallace, 69). A supplementary or ancillary bill, or any bill not original, must not present a new cause of action but present new facts relevant and material to an adjudication of the original cause of action. (*Story on Equity Pleading*, sect. 339).

The appellant lays hold of the argumentative language of Mr. George Foster Peabody's affidavit in opposition to the complainant's motion for a

receiver in the Utah cause. The Court will perceive, on reading the affidavit, that the use which the appellant would make of it is a sheer perversion. Upon that motion, after it had been argued, the complainant produced the advertisement of Spencer Trask & Co. which appears in the bill. To this Mr. Peabody said in his affidavit that he was advised that the provision made for the protection of Spencer Trask & Co. against the guaranty which they had given the proposed purchasers of the stock was "a fact against and not in "favor of the complainant's motion as it gives a "greater assurance that if the complainant's claim "shall be established, it will be paid." An important question upon the motion was whether there were danger that, if complainant established his claim, the Western Company would be able to respond. Obviously what Mr. Peabody meant was that the indemnity which his firm was giving the purchasers from it of the common stock against the claim of the complainant and the indemnity which in turn his firm was taking for its own protection, made it not less likely, but more likely, that the complainant's claim, if established, would be paid. The fact that, if it were established, Spencer Trask & Co. would be liable in case the Company did not pay it, increased,—not diminished,—the probability that the claim, if valid, would be paid. So Mr. Peabody's statement that the "*result* of this provision" (that is to say the provision for indemnity) was that any just claim of the complainant was secured not only by the assets of the Western Company, but

by a special amount to be held in trust by Spencer Trask & Co., obviously meant no more than that the guaranty which the firm had given, and the indemnity which it had taken, operated as additional practical assurances that the complainant's claim, if it were valid, would be paid, and that in view of the great probability that the complainant's claim would be met if it were established, a receiver ought not to be appointed.

III.

The decree should be affirmed with costs.

New York, April 12th, 1904.

Edward M. Shepard,
Wm. Mason Smith,
of Counsel for Appellees.

SUPREME COURT

No. [illegible]

MARTHA RATHBUN, [illegible]
OF NATHANIEL W. RATHBUN, [illegible]

vs.

SPENCER CHASE, GEORGE [illegible]
EDWIN M. BULKLEY, CHARLES [illegible]
AND AGNETA NICHOLS,
[illegible]

SUPPLEMENTAL [illegible]
APPELLEES.

EDWARD M. [illegible]
Counsel for the [illegible]

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 229.

MARTHA RAPHAEL, ADMINISTRATRIX OF THE ESTATE OF NATHANIEL W. RAPHAEL, DECEASED,

APPELLANT,

versus

SPENCER TRASK, GEORGE FOSTER PEABODY, EDWIN M. BULKLEY, CHARLES J. PEABODY, AND ACOSTA NICHOLS,

APPELLEES.

SUPPLEMENTAL MEMORANDUM FOR THE APPELLEES.

As the appellant's counsel did not file his brief pursuant to the rule, and the counsel for the appellees has first seen the appellant's brief while in attendance here for the argument, permission is asked to submit a brief Memorandum in Reply.

The appellant declares that the complainant's bill was filed "to stay waste." This is the first suggestion that we have yet heard or seen in this case that it involves any such ques-

tion. No threatened waste of the spurs of railroad included in the Utah suit is even suggested in the bill. None was mentioned in the court below. That the Rio Grande Western Railway Company was likely to injure the property while in its possession was not hinted. On the contrary, the record discloses that that company had been at great expense in improving the property. The railway company is not a party to this suit. It was not alleged, nor is there the pretense of a claim that the present defendants are in any control of the railroad, or that their interest was anything more than that of holders of portions of the common stock of the railroad. The spurs of railroad involved in the Utah suit are no part of the subject-matter of this suit.

The appellant's counsel in his own statement, at page 6 of his brief, declares:

> "That the *only object of the suit* is to subject the *said* "*fund* to the control of the court pending the suit in "Utah, and that it is believed the rights of the said "Raphael as complainant and all the interests of the "appellees as members of said firm can be litigated "and determined in an action against the remaining "appellees, Spencer Trask, George Foster Peabody "and Acosta Nichols without joining as defendants "the said non-residents Edwin M. Bulkley and "Charles J. Peabody."

The appellant has correctly stated the purpose for which the complainant's bill was filed and the only imaginable cause of action set out. A suit to restrain waste would have been filed against the company in possession and control of the mortgaged premises and the alleged surplus earnings,

or possibly against its officers and directors, but certainly not against mere holders of such company's stock.

The authorities cited by the appellant not only do not support his contention but illustrate its unsoundness.

Erhardt v. Boaro, 113 U. S., 537.—There had been an original suit to recover mining property. The plaintiff in that suit filed a supplemental or ancillary bill, alleging that the defendants, being wrongfully in possession, were removing the ore and therefore wasting the property, and obtained against the defendants in that suit an injunction to prevent such waste. The injunction suit seems to have been in the same court as the action to recover possession.

Marshall v. Turnbull, 32 Fed. Rep., 124.—The bill was filed for foreclosure of the mortgage, and the question litigated was whether on a motion for a preliminary injunction upon allegations that the defendants were wasting the actual property involved in the same suit, before the same court, the court would enjoin them.

Pacific Railroad v. Missouri Pacific Co., 111 U. S., 505.—This was a suit to set aside a foreclosure as collusive and fraudulent. It was brought in the same court, and the additional parties brought in were those who had acquired some real or apparent right to the property under the decree. Therefore it was that this court held that—

> "the bill, though an original bill in the Chancery "sense of the word, is a continuation of the former "suit on the question of the jurisdiction of the circuit "court."

In addition to the authorities upon our brief, we respectfully refer the court to the note on ancillary suits in 36 C. C. A., 195, where a classification of such suits is to be found, and

especially to the decision of the circuit court of appeals of the fifth circuit, rendered in 1894, in *Anglo-Florida Co. v. McKibben*, 65 Fed. Rep., 529, where, upon a state of facts much more favorable for the claim of ancillary jurisdiction than the present case, the court decided that the bill was (p. 530)—

> "not in any proper or legal sense a supplemental or "ancillary bill and that the jurisdiction of the court "cannot be maintained on that ground."

EDWARD M. SHEPARD,
WM. MASON SMITH,
Counsel for the Appellees.

WASHINGTON, MONDAY, APRIL 18, 1904.

Supreme Court of the United States.

No. 229.—October Term, 1903.

Martha Raphael, Administratrix of the Estate of Nathaniel Raphael, Deceased, Appellant,
vs.
Spencer Trask, George Foster Peabody, Edwin M. Bulkley, Charles J. Peabody, and Acosta Nichols.

Appeal from the Circuit Court of the United States for the Southern District of New York.

[May 2, 1904.]

This suit was begun by filing a bill in the Circuit Court of the United States for the Southern District of New York, seeking an injunction restraining the defendants, Spencer Trask & Company, from selling certain shares of capital stock of the Rio Grande and Western Railway Company to the Denver and Rio Grande Railway Company, unless a sufficient sum of money was deposited to indemnify the complainant upon the demand hereinafter set forth.

It appears from the allegati ns of the bill that Nathaniel W. Raphael, since deceased, now represented by Martha Raphael as administratrix, on January 7, 1901, filed a bill in the United States Circuit Court for the District of Utah against the Wasatch and Jordan Valley Railroad Company and the Rio Grande and Western Railway Company and the Union Trust Company of New York, the object being to foreclose a mortgage given by the Wasatch and Jordan Valley Railroad Company, and to redeem from two independent mortgages certain branch railroads in the possession of and claimed to be owned by the Rio Grande and Western Railway Company.

While that suit was pending the present action was begun. The bill averred that the defendants, composing the firm of Spencer Trask & Company, had undertaken to obtain stock of the Rio Grande and Western Railway Company, and to sell the same to the representatives of the Denver and Rio Grande Railway Company, which company was proceeding to acquire the railroad of the Rio Grande and Western Railway Company by acquiring the common and preferred stock of that company.

It is averred that Spencer Trask & Company, while negotiating the sale of said stock, learning of the foreclosure proceedings commenced by Raphael in the Utah court, made the following public advertisement:

"Since the commencement of the negotiations one Raphael has instituted in the United States Circuit Court of Utah a suit against the title of the Western Company to the Bingham and Alta spurs of its railroad; and in making the contract for the vendors our firm gave its personal guarantee

against any liability of the company in that suit. Although the company's solicitors are confident of success, it is proper that our guarantee be ratably shared by all who avail themselves of the contract made by us for the vendors. From the $80 per share and interest mentioned above we shall, therefore, deduct such amount per share as counsel shall advise us will amply protect us upon such guarantee. Such amount will be held in a special trust."

The bill *further avers:*

"That the members of said firm of Spencer Trask & Company are not parties to the suit pending in Utah, and that there is no agreement existing between complainant and the other holders of the outstanding bonds similar to complainant's bonds, and Spencer Trask & Company, by which the said proposed 'fund' shall be applied toward the satisfaction of complainant's bonds and the other outstanding bonds."

There are further allegations that the complainant—

"Is informed and believes that if said consolidation as set forth in the scheme contemplated by the advertisements referred to, is allowed to be carried out, without some stipulation between your orator and the members of the said firm of Spencer Trask & Company, as to the custody of the said fund, proposed to be created as aforesaid, the rights of remote purchasers of the mortgage premises, upon which complainant claims a lien, will have intervened pending complainant's suit in Utah, so that if complainant succeeds at the final hearing of his suit in Utah, it will require the bringing into the suit, as defendants, such remote purchasers, as the Denver and Rio Grande Western Railway Company and their proposed successors."

The prayer for relief is:

"That a preliminary injunction be issued restraining the said members of the firm of Spencer Trask & Company from selling the said shares of the capital stock of the Rio Grande Western Railway Company to the Denver and Rio Grande Western Railway Company as set forth in the said advertisements of Spencer Trask & Company, and which injunction your orator prays may be made perpetual upon the final hearing of this suit, unless the firm of Spencer Trask & Company shall agree to turn over to some trust company in the city of New York, at and before the completing of said sale of said shares, a sum of money which may be determined by this court, out of the proceeds of said sale, as will be sufficient to satisfy complainant's claim and the other outstanding bondholders similar to his own, upon the final hearing of complainant's suit in Utah."

The bill also refers to the affidavit of one of the defendants, George Foster Peabody, filed in the Utah suit. This affidavit is annexed to the bill of complaint, and is in part as follows:

"One stipulation of the agreement for the sale of common stock of the Rio Grande Western Railway Company made by my banking firm of Spencer Trask & Company is that my said firm shall guarantee the purchaser against any claim of the complainant in this suit. The statement in that respect contained in the circular letter of my firm to the holders of the common stock of that company, of which one of such cuttings is a copy, is as follows:

"'Since the commencement of the negotiation one Raphael has instituted in the United States Circuit Court for Utah a suit against the title of the Western Company to the Bingham and Alta spurs of its railroad; and in making the contract for the vendors our firm gave its personal guarantee against any liability of the company in that suit. Although the company's solicitors are confident of success, it is proper that our guaranty be ratably shared by all who avail themselves of the contract made by us for the vendors. From the $80 per share and interest mentioned above we shall, therefore, deduct such amount per share as counsel shall advise us will amply protect us upon such guarantee. Such amount will be held in a special trust.'

"The result of this provision is that if the complainant have any just claim, its payment is secured not only by the great excess of the assets of the Rio Grande Western Company itself over its debts, but also by a special amount to be held in trust. I am advised by the counsel of the Western Company that such provisions is a fact against, and not in favor of, the complainant's motion, as it gives a greater assurance that, if the complainant's claim shall be established, it will be paid.

"The statement of the said Raphael in his affidavit, that the retention of a fund to indemnify my said firm for their proposed guarnanty against complainant's claim, is an attempt on the part of the Western Company to hinder and delay the complainant, is unqualifiedly false. The Western Company is in no way a party to the agreement or provision for such indemnity or such guaranty. The Western Company, if the purchase of its common stock shall be completed, will be itself indemnified against any claim of complainant."

To the bill of complaint the defendant filed a plea to the jurisdiction of the court, appearing for that purpose and no other, setting forth that the plaintiff at the time of the commencement of the suit was, and continues to be, a citizen of the State of New Jersey; that two of the defendants, Charles J. Peabody and Edwin M. Bulkley, were, at the time of the filing of the bill and the beginning of the suit, citizens of the State of New Jersey, and were not and had not been for over eight years either citizens or residents of the State of New York.

The cause being brought on for hearing upon the plea, the bill of complaint was dismissed for want of jurisdiction.

Subsequently an application was made for leave to amend the bill and file a supplementary bill, which application was denied.

Upon dismissing the bill for want of jurisdiction, the trial court certified the question of jurisdiction and the cause came here by direct appeal.

Mr. Justice DAY, after making the foregoing statement, delivered the opinion of the Court.

The Circuit Court sustained the plea of the defendants upon two grounds: 1, that the suit could not be maintained for want of the required diversity of citizenship; and, 2, that it could not be maintained as an ancillary or

dependent proceeding for want of proper averments to bring the case within that branch of equity jurisdiction.

As the offer to amend and file a supplemental bill was not entertained in the court below, and as the exercise of this discretion is not reviewable here, except in special cases, we are only concerned with the correctness of the conclusion of the Circuit Court in dismissing the original bill.

As the case was brought on for consideration on bill of complaint and plea, the allegations of the plea are taken as admitted as upon demurrer thereto (*Farley* v. *Kitson*, 120 U. S. 303–14.)

Looked at as an original bill, it is elementary that all the parties on one side of the controversy must be of diverse citizenship to those on the other. It is argued that the relief is sought not against the firm or its members personally, but to restrain the disposition of the fund pending the controversy or to require it to be paid into the hands of a holder for the benefit of the complainant as his rights may be established, and as some of the defendants are residents of New York, the bill can be maintained.

But we cannot concede the soundness of this claim. The action is against the firm, and every member of the firm is interested in the result. The proceeding is against them jointly. As between the complainant and the members of the firm who are residents of the State of New York there is no separable controversy. The partners are jointly and equally interested in the fund alleged to be held and in the disposition of the suit commenced by the complainant. This proposition is so plain as to scarcely require the citation of authorities. In *Stone* v. *South Carolina*, (117 U. S. 430,) the State of South Carolina commenced an action to recover certain money from partners. Stone, one of the partners, sought to remove the case on the ground that he was a citizen of the State of New York. The application was denied, and upon this subject Mr. Chief Justice Waite, speaking for the court, said:

"The cause of action is joint, and only one of the defendants petitions for removal. . . . Neither is there any separable controversy in the case, such as might, if the necessary citizenship existed, allow Stone alone to remove the suit without joining Corbin with him in the petition for removal. The money sued for was received by the defendants as partners, and they are liable jointly for its payment, if they are liable at all."

We have no doubt that the case cannot be sustained as an original suit dependent upon diverse citizenship.

Can the bill be sustained as an ancillary or supplementary bill?

We had occasion to consider the nature of ancillary bills in the late case of *Julian* v. *Central Trust Co.*, decided at this term, (193 U. S. 93,) and we are unable to find any precedent in the reported cases or text books which will maintain this bill in that aspect. Ancillary bills are ordinarily maintained in the same court as the original bill is filed, with a view to

protecting the rights adjudicated by the court in reference to the subject matter of the litigation, and in aid of the jurisdiction of the court, with a purpose of carrying out its decree and rendering effectual rights to be secured or already adjudicated. (Story Eq. Pleading, 8th ed. § 326 *et seq.*; *Root* v. *Woolworth*, 150 U. S. 401, 411; Bates Federal Equity Procedure, vol. 1, § 97.)

In the present case, the original action was begun to foreclose a mortgage upon property Utah. It had nothing to do with the sale of the stock by the stockholders represented by Spencer Trask & Company. The stockholders were not parties to the Utah bill, nor could any relief be had against them in that suit. The purpose of Spencer Trask & Company in calling upon the vendors of the stock to deposit a certain amount, while having reference to the suit begun in Utah, did not evidence any agreement upon their part to indemnify the complainant because of any obligation or desire to protect him, but was a matter between that firm and the stockholders for whom it was acting. The purpose was to protect the selling firm, because of its guaranty to the purchasers of the stock, in case of any diminution in the value of the property in the event that the complainant prevailed in the suit in the Utah court. There was no privity of contract or trust relation between the complainant and defendants to this suit.

It is true that the affidavit of George Foster Peabody, upon which much reliance is had, gives some support to the claim that the advertisement embodied an agreement for the indemnification of the complainant. At most this is but the construction that Mr. Peabody placed upon the advertisement, and could not enlarge the rights of the complainant nor in any way change the true nature of the proceeding. Nor does it appear that this fund, had the complainant stood in such relation of privity of contract that he could claim the benefit of it, was necessary to the protection of the complainant's right in the property held by the railroad company, against which he was proceeding in Utah. There is nothing to show that the railroad company, with the large surplus which it was alleged to have accumulated, could not have responded to any decree which the complainant might have recovered in the foreclosure suit.

Nor can the bill be maintained as one to stay waste. There is no estate of complainants in the hands of Spencer Trask & Company which is likely to be wasted pending the suit. As the complainant shows no legal or equitable right to the fund furnished by the stockholders, neither the method of its management nor its protection from diminution can concern him.

We are of opinion that the Circuit Court was right, and that the bill cannot be maintained either as an original or ancillary proceeding.

Judgment affirmed.